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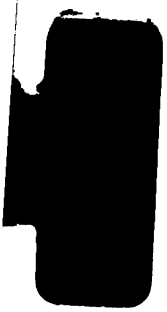

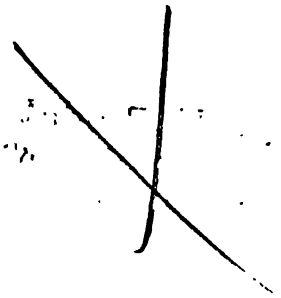

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MASSACHUSETTS REPORTS

169

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JUNE 1897 — NOVEMBER 1897

GEORGE F. TUCKER

REPORTER

BOSTON

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

AUGUSTUS S. LOVETT, trustee, *vs.* JOHN E. FARNHAM, administrator, & others.

Middlesex. March 17, 18, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Trust not Revoked and Superseded by New Trust.

A voluntary trust completely established, with no power of revocation reserved, cannot be revoked or set aside at the will of the person by whom and with whose property it was set on foot.

Where an absolute discretion is not clearly given, to be exercised at the will of the person empowered to make a sale or appropriation of principal, an exercise of the power, to be valid, must be founded upon a reasonable judgment dealing with existing facts and reasonable anticipations of the future, and having due regard for the purposes for which the power was given, and also for the rights of those whose interests are injuriously affected by its exercise.

A woman placed funds in the hands of A., in trust to pay over the income for her support and maintenance "as she shall require it, and such portion of the principal as she in her judgment may deem necessary for her comfort and support, and at her death, after the payment of her just debts and funeral expenses, to divide" what remained "equally between her two children, . . . share and share alike, if they be then living, and if either or both of them be dead then to their children by right of representation." After having paid over the income for five years, A. received from the settler a letter stating, "I hereby request of you at this time" a certain sum, "or whatever may be the value of the principal, and which I deem necessary at this time for my comfort and sup-

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port." A few days thereafter a new trust instrument was signed by him and the settler in duplicate, and he was informed that the letter and this new trust agreement constituted a revocation of the first trust, and that the property held by him thereunder had been revested in him under the second trust. *Held*, on the death of the settler, that the first trust was not revoked, and the second trust was not substituted therefor.

BILL IN EQUITY, filed February 1, 1897, by a trustee, to obtain the instructions of the court as to the disposition of a trust fund in his hands. Hearing before *Barker*, J., who reserved the case, upon the bill and the answers, for the determination of the full court. The facts appear in the opinion, and in notes by the reporter.

J. E. Farnham, *pro se*.

A. T. Johnson, for Frank D. Montgomery.

S. H. Tyng, for George W. Montgomery and others.

F. L. Hayes, guardian *ad litem*, for Malcolm F. Storrs and others.

BARKER, J. No power of revocation is reserved to the original owner of the property put in trust by the instrument of April 21, 1891. The stipulation that the trustee shall pay over to her "such portion of the principal as she in her judgment may deem necessary for her comfort and support," is not a power of revocation, but an agreement for the performance of the trust in a way declared by the instrument itself.* If he pays over to her the whole principal upon its being deemed necessary by her for her comfort and support, she has not revoked the trust, but has required its performance, and the trustee has executed it, and the instrument, having performed its office, no longer controls the disposition of the property.

In this Commonwealth it is settled that a voluntary trust completely established, with no power of revocation reserved, cannot

* This instrument, which was signed by the plaintiff, contained the following: "By authority given to me in writing by the said Lemira Storrs, I hereby agree to invest, hold, and handle said funds, and pay over the income thereof for the support and maintenance of her, the said Lemira Storrs, as she shall require it, and such portion of the principal as she in her judgment may deem necessary for her comfort and support, and at her death, after the payment of her just debts and funeral expenses, to divide what then remains in my hands equally between her two children, Richard S. Storrs and Susan G. Montgomery, share and share alike, if they be then living, and if either or both of them be dead then to their children by right of representation."

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be revoked or set aside at the will of the person by whom and with whose property it was set on foot. *Taylor* v. *Buttrick*, 165 Mass. 547. *Keyes* v. *Carleton*, 141 Mass. 45. *Sewall* v. *Roberts*, 115 Mass. 262. *Viney* v. *Abbott*, 109 Mass. 300. *Falk* v. *Turner*, 101 Mass. 494. *Stone* v. *Hackett*, 12 Gray, 227, 230. *Hildreth* v. *Eliot*, 8 Pick. 293.

The settler requested in writing of the trustee the whole principal of the fund, stating in the writing that she deemed it necessary at that time for her comfort and support. This request was acceded to by the trustee without question, and was in effect complied with, not literally by actually paying over or transferring the principal, but by a new written acknowledgment, signed by her and the trustee, that the latter had received and was possessed of her property, and that by her authority and request he agreed to hold and invest it, paying to her the income and also such portion of the principal, from time to time, as she might desire, and at her death to transfer all of the property then held to the executor of her will.

But it also appears from the petition, the allegations of which are admitted, that Richard S. Storrs — one of her two children to whom, by the terms of the original trust, what should remain of the fund after the payment upon her death of her debts and funeral expenses, was to go, share and share alike, if then living — had died on April 4, 1896, and that about April 16, 1896, her grandson George W. Montgomery called upon the trustee and stated to him that she then wished to create a new trust and to take up the old one, and to make a different disposition of the fund. The trustee referred the grandson to an attorney as a proper person to consult in regard to such steps as were necessary, and thereafter her letter referred to, requesting of the trustee the whole principal of the fund, and stating that she deemed it necessary at that time for her comfort and support, was given to the trustee, and a copy of an instrument purporting to be her last will was shown to him. Then, on May 21, 1896, the new trust instrument of that date was presented to him, and signed by him in duplicate, and he was at the same time informed that the two papers, the written request of April 16 and the new trust agreement of May 21, constituted a revocation of the first trust, and that a new trust was created, and that the property held by

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him under the first trust had been revested in him under the second trust.*

The trustee had no personal interview with the settler after the making of the first trust, and never made to her, or to any agent or attorney for her, any actual delivery of the trust property, or any assignment, transfer, or bill of sale. She was a widow, and he had been the executor of her husband's will, and the property put in trust by the instrument of April 21, 1891, was about six thousand dollars in amount, and came from three policies of life insurance upon the deceased husband's life, which were among the assets of his estate. What other means than this money she had does not appear. She had only two children, a son and a daughter, each of whom had children, and there is no statement as to their pecuniary circumstances.

She left a will dated November 25, 1890, giving her wearing apparel, household furniture, gold watch, and silver ware to her daughter, and the residue of her estate to her son and daughter, share and share alike; also a codicil dated April 17, 1896, (the son having died on April 4, 1896,) revoking the legacies and devises given by the will, and bequeathing one thousand dollars to be equally divided between the children of her deceased son, and all the residue of her property real and personal to her daughter, but further providing otherwise if the daughter should die before her, which did not in fact happen, the mother dying on June 10, 1896, and her daughter surviving until September 2, 1896. There are now living three children of the daughter and three of the son. Two of the daughter's children are of full age, and one of them and all of the son's children are minors.

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* The letter of April 16, 1896, stated that by the original instrument "I am entitled to such portion of the principal as may in my judgment be necessary for my comfort and support, therefore I hereby request of you at this time" a sum named, "or whatever may be the value of the principal, and which I deem necessary at this time for my comfort and support."

The new trust agreement, which was signed by both the trustee and Lemira Storrs, contained the following: "By authority from and at the request of said Lemira Storrs I hereby agree to invest, hold, and handle said funds, and pay over the income to said Lemira Storrs at her request, and also such portion of the principal from time to time as she may desire. It is also the wish of said Lemira Storrs that upon her death I shall pay or transfer to the executor named in her will all of said property which I may hold at that time, and I accept this trust upon said conditions."

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Considering all these circumstances, it is difficult to decide whether what has happened constitutes a performance, or an ineffectual attempt to revoke the original trust.

On the one hand are the statements to the trustee, that the settler wished to create a new trust, and to take up the old one and make a different disposition of the fund, and that the documents of April 16 and May 21, 1896, constituted a revocation of the first trust.

On the other hand, the document of April 16 says nothing about a revocation, and is of the tenor which would be used if the whole principal of the fund were in fact necessary to the comfort and support of the settler, and she deemed it necessary for that reason to have the trust performed by placing the property back into her hands as her own.

It is not contended that the performance of the trust by placing the whole principal in her hands was in fact necessary to her support, and she did not in fact use it for her support, but, *uno flatu*, devoted it to founding a new trust. But by that new trust the trustee was to pay her such portion of the principal as from time to time she might desire, and she died within a few days after the new instrument was completed. If she had little other property than the fund, or was in merely moderate circumstances, there are possible situations in which her absolute ownership of the whole principal might be reasonably necessary for her "comfort and support"; as, for instance, the necessity of travelling abroad for her health, or of providing for an expensive surgical operation, or perhaps of providing a home.

The fact that, in the short interval between regaining her power over the fund and her death, she made no such use of the property, is not conclusive that her true purpose was not to use it in good faith, in some such way, for her comfort and support. While the right to call for "such portion of the principal as she in her judgment may deem necessary for her comfort and support" expressly makes her own judgment the test, we think that the provision implies the exercise of her honest judgment upon the question whether at the time the transfer to herself of the whole principal was necessary for her comfort and support. See *Hawkins* v. *Graham*, 149 Mass. 284. Little aid is given by decisions which have dealt with similar phrases, for the reason that what

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is necessary for the comfort and support of a particular individual must depend so much upon the circumstances of the particular case. See *Conant* v. *Stratton*, 107 Mass. 474. See also *Minot* v. *Prescott*, 14 Mass. 496; *Stevens* v. *Winship*, 1 Pick. 318, 325; *Larned* v. *Bridge*, 17 Pick. 339; *Harris* v. *Knapp*, 21 Pick. 412; *Dodge* v. *Moore*, 100 Mass. 335; *Whitcomb* v. *Taylor*, 122 Mass. 243, 248; *Bamforth* v. *Bamforth*, 123 Mass. 280; *Hoyt* v. *Jaques*, 129 Mass. 286; *Hoxie* v. *Finney*, 147 Mass. 616; *Chase* v. *Ladd*, 153 Mass. 126; *Kent* v. *Morrison*, 153 Mass. 137; *Ladd* v. *Chase*, 155 Mass. 417, 421.

The general impression to be gathered from these cases is that, where an absolute discretion is not clearly given, to be exercised at the will of the person empowered to make a sale or appropriation of principal, an exercise of the power, to be valid, must be founded upon a reasonable judgment dealing with existing facts and reasonable anticipations of the future, and having due regard for the purposes for which the power was given, and also for the rights of those whose interests are injuriously affected by its exercise.

We do not now consider whether the words used in this instrument, "necessary for her comfort and support," may have a larger meaning than "necessary for her comfortable support." There is nothing to indicate that she called for the principal because she deemed its transfer to herself necessary to her contentment or peace of mind. In her demand she makes the bald statement that she asks the principal which she deems necessary at this time for her comfort and support.

It is not necessary to impute bad faith to her in making the demand and statement. The natural inference from the statements of the petition is that she was advised that she had power to revoke the trust, and, desiring to do that, executed such instruments as were prepared for that purpose by counsel who were of opinion that she had the right to revoke.

But after considering carefully all the circumstances, and being of the opinion that she had no right of revocation, we are brought to the conclusion that her request for the principal, accompanied by the statement that she deemed it necessary at that time for her comfort and support, was not in fact what it purported to be; that it was not founded upon her judgment of

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what was necessary to her comfort or support, but was really an intended revocation of the trust, and a diversion of the fund to other uses than for her comfort and support, and contrary to the terms of the trust.

We are therefore of opinion that what was attempted by the transaction subsequent to the death of the son was unavailing, and that the petitioner should be directed to dispose of the fund in accordance with the terms of the instrument of April 21, 1891. That is, he is to pay the settler's just debts and funeral expenses, and, one of the settler's two children being dead at the time of her death, he is to divide what then remains in his hands among the six grandchildren. *So ordered.*

LEANDER McBRIDE & another *vs.* POTTER-LOVELL COMPANY & others.

Suffolk. March 18, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Equity — Contribution — Pledgor and Pledgee — Marshalling of Assets — Rights of Assignee in Insolvency.

A banker and broker who held the promissory notes of several of his customers for sale for their benefit fraudulently pledged them at different times as security for his own debt to a person who took them in good faith, for value and without notice, and who from time to time collected enough of these notes, as they fell due, to satisfy the debt of the pledgor, who had become insolvent. One of the makers of the notes demanded the return of his note by the pledgor before it had been pledged, and refused to pay it to the pledgee. *Held*, on a bill in equity for contribution, brought by one of the makers of the notes against the pledgor, the pledgee, and the other makers, that, all the notes being pledged as security for the same debt, the whole loss should be borne by all the makers in proportion to the amounts of the notes so pledged; that the demand for the return of his note by one of the makers was immaterial, and that the assignees in insolvency of the pledgor had no interest or duty in the case.

BILL IN EQUITY, filed September 4, 1890, against the Potter-Lovell Company, the Second National Bank of Boston, and, by amendment, against John Brooks and George S. Bullens, assignees in insolvency of the Potter-Lovell Company, and against the North Star Boot and Shoe Company, and divers other defend-

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ants, makers of certain promissory notes, which, with promissory notes made by the plaintiffs, the bill alleged, had been fraudulently pledged by the Potter-Lovell Company as security for its own debt to the Second National Bank of Boston. The prayer of the bill was that the assets might be marshalled; that each of the makers of the notes named as defendants should be directed to contribute his equitable share to the payment of the indebtedness of the Potter-Lovell Company to the Second National Bank; for the appointment of a receiver; for an injunction; and for other relief.

The case was heard on the pleadings, the report of a master, and an agreed statement of facts by *Barker*, J., who reserved it for the consideration of the full court. The material facts appear in the opinion.

E. W. Hutchins & B. L. M. Tower, for the plaintiffs.

S. H. Tyng, for the North Star Boot and Shoe Company.

J. C. Coombs, for the assignees of the Potter-Lovell Company, submitted the case on a brief.

C. R. Elder, for Charles J. Walker and Company, also submitted the case on a brief.

C. K. Cobb, for the other defendants.

ALLEN, J. The Potter-Lovell Company, a corporation, held certain notes of the plaintiffs for sale, and it was to remit to them the proceeds, less its commissions for selling the same. The Potter-Lovell Company also held notes of others of the defendants, which it had received from them for sale. Instead of selling the above mentioned notes for the benefit of the several makers, the company at different times wrongfully and fraudulently pledged all of them to the Second National Bank as security for its own debts to said bank, all the notes being pledged for the same debts. The bank, being a *bona fide* holder for value without notice, collected enough of these notes from time to time as they fell due, including the notes of the plaintiffs and some others, to satisfy its claims against the Potter-Lovell Company. All of the various parties whose notes were thus fraudulently pledged stood on the same footing, except that the notes were pledged at different times, and fell due and were collected at different times; and except that one of the parties, the North Star Boot and Shoe Company, demanded the

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return of its note from the Potter-Lovell Company before the same was pledged, and has never paid the same in whole or in part to the bank.

These differences do not vary the equitable rights and liabilities of the parties as amongst themselves. The liability to contribute does not depend on a contract between the parties who are held liable to contribute, and is not affected by the fact that notes were pledged and fell due and were paid at different times, or that some of them were paid only in part, or not at all. The notes were all pledged to secure the same indebtedness. The fact that some of them fell due at earlier dates than others creates no equity in favor of those which fell due last. See *American Loan & Trust Co.* v. *Northwestern Guaranty Loan Co.* 166 Mass. 337. The various parties selected a common agent, and this agent used its power to place them all under a common liability, thus virtually making them all sureties for itself. It might be that under such circumstances the pledgee would prefer to hold one and exonerate another, and it would have power to do so in the first instance by proceeding to collect of one, but not of another. But where several different parties have thus been exposed to loss by the fraud of their common agent, it is more equitable that the burden of the loss should be shared *pro rata*. Under such circumstances equality is equity, without respect to the time of the maturity of the notes. The demand by the North Star Boot and Shoe Company for the return of its note was also immaterial. It was no more fraudulent to pledge this note after such demand than it would have been to pledge it before a demand. All the notes being pledged as security for the same indebtedness, the whole loss in consequence thereof is to be borne by all the makers in proportion to the amounts of the notes so pledged. *Gould* v. *Central Trust Co.* 6 Abb. N. C. 381. *New England Trust Co.* v. *New York Belting & Packing Co.* 166 Mass. 42, and cases there cited. *Wiggin* v. *Suffolk Ins. Co.* 18 Pick. 145, 153. *Warner* v. *Morrison*, 8 Allen, 566. 1 Story, Eq. Jur. § 493.

The assignees in insolvency of the Potter-Lovell Company have no interest in the case. They have no claim arising upon any of these notes, and no duty in respect to the settlement of the questions involved in this suit.

Decree for the plaintiffs.

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GEORGE S. MERRILL *vs.* COLONIAL MUTUAL FIRE INSURANCE COMPANY.

IN RE PETITION OF PETER H. CORR.

Suffolk. March 22, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Assignment of Policy of Fire Insurance as Collateral Security — Insurable Interest — Estoppel.

A policy having been issued by a fire insurance company to A., insuring him in a certain sum against loss or damage by fire upon the property described therein, an assignment thereof was made by A. to B., which on the same day was assented to by the company through its secretary. Two days thereafter the property was destroyed by fire. At all times A. was the owner of the property, and B. held the policy under the assignment only as collateral security for a sum of money larger than the amount of the insurance. Both the company and its secretary believed that the assignment was an absolute one, and were not aware until after the loss of the relation between A. and B. Proof of loss was made by A. for the benefit of B. There was no by-law of the company relating to the assignment of a policy for collateral security. *Held*, on a petition to establish the claim, which had been disallowed by the receiver of the company, that the assignment was to be construed according to the intention of A. and B.; that it left A. the insured; that the fact that B. did not have an insurable interest was immaterial, and that neither he nor A. was estopped from relying upon the company's assent to prevent the avoidance of the policy by the assignment.

PETITION IN EQUITY, filed January 14, 1897, to establish a claim on an insurance policy in the defendant company, which was disallowed by W. O. Underwood, the receiver. Hearing before *Barker*, J., who reserved the case, on the petition and an agreed statement of facts, for the determination of the full court. The facts appear in the opinion.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

J. W. Corcoran & W. B. Sullivan, for the petitioner.

W. O. Underwood, receiver, *pro se*.

BARKER, J. This petition, brought to establish a claim disallowed by the receiver, was reserved for the full court upon an agreed statement of facts, from which it appears that the claim

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is for a fire loss, of which due proof was made by the assured in behalf of the petitioner, and that the amount to be recovered, if he can recover either in his own name or in that of the assured, has been adjusted by himself and the receiver, without prejudice, in the sum of eleven hundred dollars.

As the proceedings are in equity, and the questions are raised upon an agreed statement of facts, the claim will be established in favor of the petitioner, who has the beneficial interest in it, if the defendant is liable to any one for the loss.

The policy was issued, October 1, 1895, to Frederick Barlow, the owner of the property insured. The policy contained a condition that it should be void if assigned without the consent in writing or in print of the company. On November 12, 1895, Barlow filled out and signed a blank printed on the back of the policy, which was then delivered to the company for its consent, and whose secretary then filled out and signed another blank, also printed on the back of the policy, and returned it. These indorsements were of the following tenor:

"The Colonial Mutual Fire Insurance Company hereby consent that the interest of Frederick Barlow in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to Peter H. Corr.

"Nov. 12, 1895. Isaac B. Wheelock, Secretary."

"For value received, I hereby transfer, assign, and set over unto Peter H. Corr and his assigns all my title and interest in this policy, and all advantages to be derived therefrom.

"Witness my hand and seal this twelfth day of November, 1895. Sealed and delivered in the presence of James McNaught. Frederick Barlow. [L. S.]"

Corr never had any interest, absolute or by way of lien, in the insured property. Barlow was his debtor to an amount much more than the amount of the sum written in the policy. As between Barlow and Corr it was intended by the instrument signed by Barlow to assign to Corr the right to receive whatever might become due to Barlow by reason of any loss suffered by him under the terms of the policy while the same was in force, and this as collateral security for whatever might be due to Corr from Barlow, and it was not intended to substitute Corr for Barlow as the assured. The secretary of the company

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assented to the assignment in the ordinary course of business upon its being handed to him by a broker, filled out, and with the request to him to assent on behalf of the company. The form filled by Barlow was the usual and customary form of assignment, printed upon all of the policies of the company, and it is the form which is commonly and usually used by the company for the purpose of transferring absolutely the rights of the original assured in the policy to the assignee, and constituting the assignee, after the assent of the company, the assured. Neither the secretary nor the company had knowledge of the relation between Corr and Barlow, or that Corr had no title in the property, or that he was a creditor of Barlow, or of Barlow's intention to assign the policy merely as collateral security. The company assented to the assignment believing it to be an absolute assignment of the policy, and believing that thereafter Corr became a member of the company, and all notices since issued by it have been sent to Corr and not to Barlow. The broker who presented the assignment to the secretary with the request for the company's consent was not its own agent. He knew the relation between Corr and Barlow, the ownership of the property, and that the assignment was intended only as collateral security, and did not communicate the facts to the company. The fire occurred on November 14, 1895, and the property was then owned by Barlow, and not by Corr. A proof of the loss was duly made by Barlow for the benefit of Corr. There is no by-law of the company relating to the assignment of a policy for collateral security, and among the by-laws stated there is none relating to assignments of any kind or for any purpose. The company is mutual, with the power of assessing its members in accordance with the statutes.

The receiver does not contend that the policy became void under the condition that it should be so if assigned without consent of the company. There was such consent, however obtained, and it has never been withdrawn or disavowed by the company or the receiver, and it is reaffirmed in the contention which the receiver now makes, that by virtue of the assignment Corr and not Barlow is the assured. Only by the assent of the company could there be a novation which would substitute Corr for Barlow as the assured.

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The receiver's contentions are, that the assignment constituted an absolute transfer of the policy to Corr, whereby he became the assured, and that he cannot recover, because while he is the assured he has not suffered any loss, nor has he put in any proof of loss as the assured, as is required by the policy; and that he cannot recover in the name of Barlow, because, although Barlow suffered the loss and made due proof, he was not after the assignment insured under the policy.

So far as the proof of loss is concerned, it would be enough to say that the agreed statement is that the proof of loss was duly made by Barlow for the benefit of Corr, and that if Barlow was the assured it was for him to make it, and if Corr was the assured, the company having accepted and acted upon it as made for his benefit, without objecting at the time that it was not made by him personally, it was sufficient.

But in the opinion of a majority of the court all the contentions of the receiver are unsound, because, though absolute in form, the assignment did not constitute an absolute transfer of the policy to Corr, but an assignment as collateral merely, to secure his debt by enabling him to receive whatever might become due to Barlow in case of a loss under the policy. Every conveyance may be shown by parol to be not an absolute transfer, but intended merely as collateral security, and here the facts are agreed. In this respect, aside from some stipulation in the policy or some by-law or regulation of the company, a conveyance of a policy of insurance is governed only by the rules which govern other conveyances. Policies of insurance against fire, like other choses in action, may be transferred either absolutely or as collateral security; and in the absence of any stipulation in the policy or any regulation of the insurer by which the assured or his assignee may be bound, if the original assured remains such, and does not terminate his own contract with the company, his assignee may collect any sum which may become payable by the insurer by process in the assignee's own name if the insurer has assented to the assignment, and otherwise in the name of the assured; and the assignment, if it leaves the assignor still interested in the contract and in the loss, does not make the insurance void because the assignee has no insurable interest in the property. See *Fogg* v. *Middlesex Ins. Co.* 10 Cush. 337;

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Phillips v. *Merrimack Ins. Co.* 10 Cush. 350; *Hale* v. *Mechanics' Ins. Co.* 6 Gray, 169.

Of course, if the assured parts with his whole interest in the contract by an absolute assignment of it to another, so that thereafter the indemnity which the policy promises cannot enure to his benefit, he cannot recover for a loss, and if in such a case his assignee has no insurable interest in the property the insurance would be void. But the assignment in the present case being in fact not absolute, but merely as collateral security, Barlow did not part with his interest in the policy, or sever his relation to the company, but remained the real owner of the company's promise of indemnity in case of loss by fire. He was still the assured, the loss was his loss, and the whole indemnity enures to his benefit, though payable to another to apply upon his debt. The legal effect of such a transfer is the same as a direction to pay to another in case of loss, and, in the absence of any prohibition in the policy or by-laws, either method may be properly taken to produce the result. If Barlow remained the assured, he was to make the proof of loss, and the fact that Corr had no insurable interest in the property is no defence.

Nor can we assent to the contention that whether Corr became the assured must be determined from the instrument of transfer itself, and not from the uncommunicated intention of Corr and Barlow, nor from acts done by them without the knowledge of the company, so that the present assignment must be held an absolute one, and the intention of Corr and Barlow immaterial.

The indemnity which the company promised was hampered by no restriction that it should not be made payable to any other person, nor that the assured should not deal with his contract in any way sanctioned by the law, save only the condition that the policy should be void if assigned without the company's consent. The condition deals with assignments generally. Nothing requires that they shall be of one character, and not of another, and the only restriction imposed upon any assignment is that it shall be consented to. Aside from this the assured could deal in any legal way with his contract and the advantages to be derived from it.

Nor can it be contended that the consent of the company

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was given under such circumstances as to be void or inoperative in favor of the petitioner, as in *Lynde* v. *Newark Ins. Co.* 139 Mass. 57. Here there was no provision that the policy was not assignable for purposes of collateral security. The company has provided only one way of making an assignment, whether it is by way of collateral or to accompany a transfer of the property insured, and it has not given, either expressly or by implication, any notice that it was to be informed of the purpose or nature of such assignments as might be brought for its consent. No misrepresentation of the facts was made to it. It made no inquiry when its consent was asked. The form which it had provided and which was used was applicable to all circumstances, and there is nothing to show that any other form was provided or expected to be used in case the assignment was intended merely as collateral security. Under this state of things the assent is good for the assignment according to the intention of the assignor and assignee, so far as that intention is within the legal meaning of the words used by them when explained by competent oral evidence.

The company assented without inquiry, and under circumstances which did not require any disclosure, to an assignment of any kind that was valid and not inconsistent with the words used. If it assumed, as it did, that the property had passed from Barlow to Corr, the assignment did not so state, and the fact that the same form was the one commonly used for transferring policies absolutely, and constituting the assignee the assured, did not under the circumstances avoid the consent or estop the petitioner from relying upon it. See *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24, 28, 29; *Bergson* v. *Builders' Ins. Co.* 38 Cal. 541; *Bibend* v. *Liverpool & London Ins. Co.* 30 Cal. 78; *Firemen's Ins. Co.* v. *Barnsch*, 161 Ill. 629; *Griffey* v. *New York Central Ins. Co.* 100 N. Y. 417; *Stevens* v. *Queen's Ins. Co.* 32 N. B. 387; *McPhillips* v. *London Ins. Co.* 16 Can. L. T. 213; *Blackburn* v. *St. Paul Ins. Co.* 116 N. C. 821.

The claim is to be established in favor of the petitioner for the sum of eleven hundred dollars, the amount agreed upon between the receiver and the petitioner.

So ordered.

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LAWRENCE WHITCOMB & another *vs.* JOHN W. DICKINSON & another.

Suffolk. March 25, 26, 1897. — June 15, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Broker's Commission — Action — Mistrial.

In an action by a broker against A., another broker, and B., the former owner of land, to recover a commission on the sale of the land, it was held that the evidence disclosed no special contract which bound A., and as the jury had been allowed to consider a payment made by A. for the purpose of bringing about the sale as a payment by a joint party to B.'s contract with the plaintiff, and thus as not having brought about the sale as against the plaintiff, it was *held* that there was a mistrial with regard to B.

CONTRACT, against John W. Dickinson and J. George Fera, to recover a broker's commission on the sale of land in Boston. At the trial in the Superior Court, before *Sheldon*, J., the jury returned a verdict for the plaintiffs; and the defendants alleged exceptions. The facts material to the points decided appear in the opinion.

G. W. Anderson, (*S. L. Powers* with him,) for the defendants.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiffs.

HOLMES, J. This is an action by brokers to recover a commission on the sale of land. It is brought against the owner of the land, and also against a broker, Dickinson, who was interested in the sale. The plaintiffs have had a verdict, and the case is here on exceptions. The first question is whether the court should have ruled that Dickinson was not liable. We are of opinion that, on the evidence, the ruling should have been given. Dickinson had no interest in the land, and he was interested in the sale only in the sense that he expected to make an independent bargain with the seller for a purchase of bonds in Chicago in case the latter got money by that means. He neither ostensibly nor in fact was a principal in the transaction. The plaintiffs knew that the other defendant, Fera, was the owner of the land. If Dickinson is to be held, it must be upon a contract which expressly purported to bind him. The account given by the plaintiffs' agent of his dealings with Dickinson, so far as

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material to this question, is that after he had written to Fera on October 29, saying that he had a possible purchaser, and asking the lowest cash price, Dickinson came to him and said that Fera had referred the letter to him, that he had charge of the building and collected rents for Fera, and that he had authority to sell Fera's property at $160,000, but that this authority would expire on November 1, or at least in a short time. The two called upon the purchaser, and Dickinson said that he would give the witness a thousand dollars from his own commission on the sale in Chicago if Fera got $160,000 for the property. He did not make any agreement with the witness that if he found a customer at a lower price he would pay a commission. The purchaser paid only $150,000. On these facts, even if the plaintiffs were warranted in their contention that in the end they were employed generally as brokers by Fera, we do not perceive any ground for holding Dickinson except in the single event contemplated by his promise, an event which did not come to pass. It is true that, on December 5, Dickinson wrote to the plaintiffs a letter saying, "I hereby withdraw from you, as brokers," the land in question, but this use of "I" to people who knew his relation to the property had no more significance than the use of the first person by a clerk behind a counter in a great shop where he is pleased to impersonate the establishment.

Being of the opinion which we have expressed with regard to Dickinson, it seems to us that justice requires a new trial with regard to the defendant Fera, even if there was evidence against him on which the plaintiffs were entitled to go to the jury. The case was tried on the assumption that the plaintiffs could not recover unless their services brought about the sale. There was testimony that Fera would not take less than $160,000, and that by reason of his ulterior interest, in order to carry the sale through, Dickinson agreed to pay ten thousand dollars above what the purchaser was willing to give. Fera based a part of his defence upon this fact. But the jury were allowed to dispose of the defence that Dickinson really brought about the sale by this payment, on the ground that Dickinson and Fera jointly employed the plaintiffs, and that the payment was a matter between the co-defendants, with which the plaintiffs had no concern. Obviously, when it is assumed that Dickinson is not liable, the argu-

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ment from his payment becomes very much stronger. If one of two fellow employers of a broker by paying money to the other induces him to make a sale, as between them and the broker the latter may be said to bring about the sale; but if a stranger to the employment offers the same inducement with the same effect, there is more ground for saying that he, and not the broker, brings the sale to pass. The result of the error as to Dickinson's liability was to produce a mistrial as to Fera.

Exceptions sustained.

ATTORNEY GENERAL *vs.* DANIEL J. DONAHUE.
SAME *vs.* CHARLES CALLAHAN.
SAME *vs.* JAMES H. CAHILL.

Middlesex. May 18, 1897. — June 15, 1897.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Quo Warranto — Statute — City Charter — Power of City Council to remove from Office — Evidence.

Under St. 1896, c. 415, entitled "An Act to amend the charter of the city of Lowell," the city council of that city may remove an executive or administrative officer without a hearing, or without assigning a reason therefor.

Upon an information in the nature of a *quo warranto*, against a person usurping an office from which he has been removed by the city council of the city of Lowell, under St. 1896, c. 415, evidence that in making the removal the city council acted on partisan grounds is inadmissible.

Whether the omission to post a copy of an order of removal of an officer by the city council of the city of Lowell, in accordance with a rule of that body which provides that, "with the exception of an order for a joint convention, any order originating in the common council shall be copied, and shall, previous to the hour for calling the meeting to order, be posted in some prominent place in the council chamber, where it may be open to inspection by the members," affects the validity of such removal, *quære;* there having been an attempted compliance with the order after objection was taken, and the objection not having been pressed further, *held* that the removal was valid.

THREE INFORMATIONS in the nature of a *quo warranto*, alleging that the defendants, Donahue, Callahan, and Cahill, had usurped the office of city solicitor, superintendent of streets, and city messenger of the city of Lowell, respectively.

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The cases were heard by *Allen*, J., on the pleadings and agreed statements of facts; and, in the cases of Donahue and Cahill, evidence that the action of the city council in removing them from office was based on partisan grounds was offered by the defendants, and excluded.

In the first case, the statement of agreed facts alleged, in substance, that on January 6, 1896, Francis W. Qua was, by the city council of the city of Lowell, duly elected city solicitor of that city pursuant to an ordinance of the city of Lowell, which provided "there shall be chosen annually in the month of January or February, and whenever a vacancy occurs, by concurrent vote of both branches of the city council, a city solicitor who shall enter upon the duties of his office on the first day of March in each year, and he shall hold his office for the term of one year from the time of entering upon the duties thereof, and until his successor is appointed or he is removed; and the said city solicitor may be removed at the pleasure of the city council"; that on the first day of March, 1896, Qua entered upon the performance of his official duties, which he had continued to perform until the time of filing of the information; that on January 4, 1897, the city council, pursuant to the same ordinance, by a concurrent vote of both branches re-elected Qua city solicitor for one year from the first day of March thereafter; that on February 19, 1897, the mayor, purporting to act pursuant to the authority of St. 1896, c. 415, § 1, appointed the defendant to be city solicitor for one year from the first day of March, 1897; that on March 9, 1897, by a joint order originating in the board of aldermen, and adopted in concurrence by the common council, the defendant was by a two thirds yea and nay vote removed from the office of city solicitor; and that, although on March 10, 1897, the defendant was notified by the city clerk of such removal, he claimed to be the duly authorized city solicitor, and under such claim he made a demand upon Qua for the books and records pertaining to the office, and interfered with the management and conduct of actions pending in the courts to which the city of Lowell was a party.

In the second case, the agreed statement of facts alleged, in substance, that, acting under authority of St. 1896, c. 415, the mayor of the city of Lowell on February 19, 1897, appointed

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the defendant to the office of superintendent of streets, and that thereafter on March 2, 1897, the city council, purporting to act under the authority of an ordinance of the city of Lowell, which provided that "there shall be chosen annually in the month of January or February, and whenever a vacancy occurs, by concurrent vote of both branches of the city council, a superintendent of streets, . . . who shall hold their respective offices until their successors are chosen or they are removed, and the said superintendent of streets . . . may be removed at the pleasure of the city council," by a joint order originating in the common council and adopted in concurrence in the board of aldermen, by a two thirds yea and nay vote removed the defendant from the office of superintendent of streets, and on March 9, 1897, by concurrent vote of the city council elected one Fowler to be superintendent of streets; but that the defendant, although notified of his removal, assumed to perform the duties of such office, and refused to surrender the same to Fowler.

In both the first and second cases it appeared that, upon the introduction into the common council of the order for the removal of Donahue, the objection was raised that a copy of the order had not been posted in accordance with a rule of that board that any joint order originating there, except an order for a joint convention "shall be copied, and shall, previous to the hour for calling the meeting to order, be posted in some prominent place in the council chamber, where it may be open to the inspection of the members." The point was sustained in Callahan's case, and thereupon the council took a recess, during which, by direction of the president, the order for the removal of officers was posted in the hallway outside the council chamber upon the bulletin board. After the recess, the point was overruled in Donahue's case, and the orders of removal in both cases were then adopted.

In the third case the statement of agreed facts alleged that on January 4, 1897, the mayor of the city of Lowell, acting pursuant to the St. 1896, c. 415, appointed the defendant to the office of city messenger; that on March 9, 1897, by an affirmative two thirds vote of the city council, the defendant was, upon a joint order introduced in the common council, and adopted in concurrence by the board of aldermen, removed from the office of city

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messenger, and on the same day one Going was, by a concurrent vote of both branches of the city council, elected to the office of city messenger; that in making such removal the city council purported to act under the authority of an ordinance of the city of Lowell, which provided "there shall be chosen annually by ballot in the month of January, by concurrent vote of both branches of the city council, a city messenger, who shall enter upon his duties on the first Monday of February, and he shall be removable at the pleasure of the city council"; that, although the defendant had been notified of his removal, he refused to deliver the keys of his office and the property in his custody to his successor; that if competent, it could be shown by evidence dehors the records, that the order for the removal of the defendant was not copied and posted in the council chamber prior to the meeting at which it was introduced, pursuant to a rule of that body, but that it was copied and posted during a recess of the common council before action had been taken thereon; and that the objection was not raised while the order was under consideration, although it had previously been raised while a similar order for the removal of another officer was under consideration at the same meeting, and had been overruled by the chair.

The presiding judge reserved the cases for the consideration of the full court.

D. J. Donahue, for the defendants in the first and third cases.

T. J. Gargan & P. J. Farley, for the defendant in the second case.

F. N. Wier, (*F. W. Qua* with him,) for the plaintiff.

HOLMES, J. It is not necessary to consider whether the appointments were valid or not, since we are of opinion that, if they were valid, the defendants were removed from office effectually by the two thirds yea and nay vote of the city council. By St. 1896, c. 415, § 2, the power of the city council to remove was separated from the power to appoint, which, by construction of the same act, was held to be given to the mayor. *Attorney General* v. *Varnum*, 167 Mass. 477. There is no indication that the power to remove, given to the city council, was part of a scheme of which the mayor's power to appoint was another essential part, in such a sense that if the latter fell the former

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would fall with it. As the power of the city council to remove was neither incident to the power of appointment nor dependent upon its continuing unchanged, it follows that it was not taken away by the restoration of the power of appointment to the city council by St. 1897, c. 95.

The power given by St. 1896, c. 415, § 2, is a power to remove without hearing, and without assigning a cause. First, the statute gives the mayor a power to remove "for such cause as he shall deem sufficient," which is a power to remove without hearing; *O'Dowd* v. *Boston*, 149 Mass. 443; but his order is not to take effect until approved by the city council. The section then goes on: "The city council may, by a two thirds vote in each branch, voting by yeas and nays, remove any of said officers without the consent of the mayor." This gives the city council the same right as the mayor to remove without hearing; and whereas the mayor is required to set forth the reasons for removal in his order, and is forbidden to remove upon partisan grounds, no such requirement or prohibition is imposed upon the city council, where both would be more difficult of application. We are of opinion that the city council was not bound to set forth its reasons in its order, and that evidence that it acted on partisan grounds was inadmissible, and properly was rejected. Of course, our decision goes wholly on the construction of the particular statute, and not on any general view as to the powers of such bodies when the statutes are silent.

What we have said disposes of the case of Donahue, where the order of removal originated in the board of aldermen. In the other two cases, the order originated in the common council, and, by a rule of that board, any joint order originating there, except an order for a joint convention, "shall be copied, and shall, previous to the hour for calling the meeting to order, be posted in some prominent place in the council chamber, where it may be open to the inspection of the members." This was not done, and an objection being taken when the first of the two orders was introduced, the council took a recess, and the orders were posted in the hallway outside the council chamber, upon a bulletin board, before any action upon them. After the recess the objection was raised again in the case of Donahue, to which, as we have said, it was not applicable, and nothing further was done with

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reference to the others. Taking this into account, and considering the doubt whether the order as to copying and posting should be regarded as more than directory, in view of its nature, we are of opinion that this objection also fails.

Judgment of ouster.

JOHN J. GEARY *vs.* JAMES STEVENSON.

Suffolk. November 11, 1896. — June 16, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Assault — False Imprisonment — Evidence — Exceptions — Law and Fact — Arrest by Private Person — Principal and Agent.

A verdict for the defendant in an action for an assault and battery and false imprisonment renders immaterial exceptions to the exclusion of evidence directed to the question of damages.

An exception to the exclusion of a question put to a witness will not be sustained, if no offer of proof was made of what the excepting party expected to prove by the answer.

In an action for false imprisonment, declarations, after the plaintiff's arrest, of the defendant's servant, who made the arrest, are inadmissible in evidence.

Evidence that the plaintiff in an action for false imprisonment had never, prior to his present arrest, been arrested or complained of for any crime, and that he had a good reputation, is properly excluded.

If the plaintiff in an action for false imprisonment was innocent of the charge upon which he was arrested by the defendant's servant, and the latter, in making the arrest, was acting solely under the defendant's authority, the defendant will be liable, but if the servant was acting solely under the direction of a police officer, and had no authority from the defendant to make the arrest, the latter will not be liable.

At the trial of an action for false imprisonment, the plaintiff having been arrested by the defendant's servant, if there is evidence that the servant for the time being was acting under the direction and control of a police officer, the judge cannot rule, as matter of law, that the servant in what he did was acting as the servant of the defendant, but the question is properly submitted to the jury.

No exception lies to the refusal to give instructions in the terms requested, if they are fully covered by the instructions given.

In an action for false imprisonment, the plaintiff, who was arrested by the defendant's servant while leaving the defendant's premises, is not entitled to have the jury instructed that, if the servant "arrested the plaintiff, complained of him to the officer on the street, and at the station house caused him to be imprisoned

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for the purpose of carrying out his employer's instructions to look out for the thieves and protect the property, he was acting within the scope of his employment, and the defendant is liable."

TORT, in two counts, for an assault and battery and false imprisonment. Trial in the Superior Court, before *Richardson*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that, on February 10, 1895, the defendant was the owner of premises on Boylston Street in Boston, the back yard of which extended in the rear to the line of Providence Street; that he had bought the premises about a year before with the intention of altering the building for business purposes, and it was entirely vacant; that the fence in the rear, along Providence Street, was in a dilapidated condition, and the gate had either been torn off or was open; that early in the afternoon of that day, the plaintiff, with one McHenry, left South Boston, where they lived, to seek employment in the city proper; that they walked across the Common and into and along Providence Street, when they reached the back yard of the premises in question; and that they both went into the yard for a few minutes to make a necessary short call.

Both testified that the plaintiff had returned to the sidewalk, and McHenry was walking after him when they heard and saw one Tholley, an employee of the defendant, coming through one of the windows in the rear of the building, sliding down a plank into the yard, and running towards the street; that McHenry, who was then near the gate, stepped aside to let him pass, when Tholley grabbed him by the collar and insisted upon taking him to the police station; that McHenry resisted, and his coat was badly torn; that, as they reached the sidewalk, the plaintiff came to his companion's assistance, and both asked Tholley for an explanation; that Tholley only said he was going to bring him to the station, and that they would there find out; that the plaintiff then took hold of McHenry and tried to get him away, and in the scuffle that ensued all three fell; and that, upon gaining their feet, the plaintiff and McHenry ran in opposite directions, the plaintiff running through Church Street to Boylston Street, with Tholley chasing him.

The plaintiff testified that he got as far as Arlington Street

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at the foot of the Public Garden, when through exhaustion he fell to the ground, and Tholley, coming up, again seized him, and against his protestations that he had done nothing insisted upon bringing him to the station; that Tholley held him by the arm and collar, and in that way walked him down Boylston Street, where they met a police officer, one Kendall; that in answer to the police officer's inquiries, Tholley said the plaintiff was a lead-pipe thief whom he had caught on the defendant's premises; and that the plaintiff protested his innocence, but the officer put handcuffs on him, and all three walked to a police station.

The plaintiff further testified, against the defendant's objection, that at the station the officer stepped aside, and Tholley made the charge of "breaking and entering" against him to the lieutenant at the desk; and that he was then searched and put into a cell, where he remained until about seven o'clock that evening, when he was taken out, placed in the police van, and then driven with other prisoners to the tombs, where he was lodged in a cell until the next morning, when he was discharged without further proceedings.

The plaintiff offered to show that while in prison, and after his dinner at home the noon before, he had nothing to eat and drink except some bread and water on the morning of his discharge. To this the defendant objected. The evidence was excluded; and the plaintiff excepted.

A slip from a newspaper the day following the arrest, stating that the plaintiff had been arrested upon the charge of breaking and entering the premises in question, was put in evidence, the defendant waiving objection; and the plaintiff testified that he showed this slip soon after to Tholley, in order to have the defendant publish a contradiction of the charge. He was then asked what Tholley said, and whether the contradiction had been made. These questions were excluded, upon the defendant's objection; and the plaintiff excepted.

The plaintiff's mother and sister both testified that the plaintiff had not been out of his own house on the day of his arrest until the afternoon, as he testified, and had remained in bed until about 11 o'clock A. M.

The plaintiff offered to prove by both these witnesses that

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Tholley met them in the court house on the morning of the plaintiff's discharge, and said to them that the defendant told him to arrest any one whom he found about the premises; that it was McHenry whom he wanted; and that he would not have arrested the plaintiff if he had not interfered. This was excluded; and the plaintiff excepted. The plaintiff also offered to show by both these witnesses that prior to this affair he had never been arrested nor complained of for any crime, and that he had a good reputation. This was excluded, upon the defendant's objection; and the plaintiff excepted.

As to Tholley's authority, the plaintiff testified that the defendant, pending a former trial, told him in conversation that he had trouble with lead-pipe thieves on the premises in question, and had authorized Tholley to arrest any one whom he found about the place. This the defendant when a witness denied, but on cross-examination admitted that he had directed Tholley to watch for the thieves, and report them to the officer on the beat; and that Tholley had been in his employ as janitor and watchman seven or eight years.

The defendant also testified that David Greer was his general agent and manager, with full authority to direct and control all his employees, including Tholley; and that whatever Greer did in this regard had his sanction.

Greer, called by the defendant, testified that, early on February 10, officer Kendall came to his office and told him that the house in question appeared to have been broken into that morning, and to send some one over there to see to it. This conversation between Greer and the officer was admitted, against the plaintiff's objection; and the plaintiff excepted.

Greer also testified that soon after he ordered Tholley to go over to the premises, and directed him to do whatever officer Kendall should tell him to do. On cross-examination, the plaintiff asked this witness if Tholley had reported the arrest to him and the charge he had preferred against the plaintiff at the station. To this the defendant objected. It was excluded; and the plaintiff excepted.

Tholley, called by the defendant, testified that he went to the premises as directed by Greer, who gave him no instructions to arrest anybody, but to act under direction of the officer; that he

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met officer Kendall there, examined the place, and found from the plank up to the rear window and other things that there had been a break early that morning; that the lead pipe in the house had been cut out and part of it carried away; that the remainder was done up in bundles, and left by the thieves near the entrance to the basement from the rear; that the officer directed him to lie in wait in the house for the thieves, who would probably return for the pipe they had left, and to detain them when they came back until he came; that the officer would walk by the rear of the house occasionally, and watch for signals; that he did as the officer directed; that nothing happened during the morning, and he locked the front of the house, and, leaving the rear basement door unlocked, went to his dinner about noon; that when he returned and came into the house he heard a noise of some one downstairs where the lead pipe was; that he looked out of the rear window and saw the plaintiff in the yard; that he saw him going out of the yard, about ten feet from the door, toward the street; that the plaintiff looked up and down the street, and then toward this window, and then motioned to some one near the basement door; that then, as McHenry came in sight from the direction of the basement door, which was open, the witness opened the window where he stood and started to slide down the plank, which had been left in the position it had been put by the thieves, that as they heard the noise the plaintiff and McHenry started to run; that he overtook and caught McHenry inside the yard; that thereupon the plaintiff interfered to liberate McHenry when they reached the sidewalk, and both succeeded in getting away from him; that they ran in opposite directions; that he chased the plaintiff to Arlington Street, where a man stopped the plaintiff and held him until the witness came up, when he took him along Boylston Street until he met the officer, to whom he delivered the plaintiff; and that he acted in all that he did under the direction of the officer, and did nothing that the officer did not direct him to do, either in the original detention or in any of the subsequent proceedings after delivering the plaintiff to the officer. The police officer, Kendall, was not called as a witness by either party.

The plaintiff requested the judge to instruct the jury as follows:

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"1. If the jury find that the plaintiff was not guilty of the charge preferred against him, and that Tholley, the defendant's agent, acted within the scope of his employment, the arrest was unlawful; the defendant has no justification, and the jury should find for the plaintiff on both counts.

"2. Where a private citizen takes the law into his own hands, and without a warrant either arrests or procures the arrest of another for any crime, he can only justify such arrest by proving the actual guilt of the person arrested. An honest belief, reasonable suspicion, or probable cause of guilt is not enough.

"3. Even if the jury find that the defendant did not specifically instruct his agent to make an arrest, still he may be liable.

"4. If Tholley arrested the plaintiff, complained of him to the officer on the street, and at the station house caused him to be imprisoned for the purpose of carrying out his employer's instructions to look out for the thieves and protect the property, he was acting within the scope of his employment, and the defendant is liable. The fact that Tholley acted in a reckless and unlawful manner is no defence."

The judge instructed the jury on matters material to the plaintiff's requests, in substance as follows, and, except so far as appears therein, the requests for instructions were declined:

"If you should find that the plaintiff went upon those premises that morning for the purpose of stealing, Tholley, though not an officer, would have had a right to arrest him and detain him. The distinction, I understand, between the right of a private person to arrest and an officer is, an officer has a right to arrest a man upon reasonable suspicion. He is an officer of the law, and is supposed to have some skill and experience in determining questions of guilt and innocence of parties, and it is not to be supposed he would arrest anybody unless he had a good reason, and therefore an officer has a little wider authority to arrest without a warrant than a private person; but a private person may arrest a man without a warrant if the man is committing a felony, that is, a crime that is punishable by imprisonment in the state prison, and stealing in a building is punishable by imprisonment in the state prison; and therefore if the plaintiff went on those premises that morning for the purpose of steal-

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ing lead pipe or any other property in that building, then Tholley, who was there as janitor, had the right to arrest the plaintiff then and there, or to follow him and arrest him. So that if you find that fact which is claimed, as I understand, by the defendant that you should find upon this evidence, you need not go any further, because he was rightfully arrested and rightfully detained. But if a private person undertakes to arrest a man, — and here is the difference between his power of arresting and that of an officer of the law, — if a private person undertakes to arrest a man not in the commission of a crime, he is bound to prove in court, if he is called upon to do so, that the man whom he arrested was committing a crime, or had entered the premises, or was about to commit a crime.

"And on this question of determining whether the plaintiff went there for the purpose of stealing the pipe in the building, I do not think you would have to prove that by the same rule that you would in a criminal case. If he was on trial in a criminal court for that offence, it would be necessary for the government to prove it beyond a reasonable doubt; but here in civil cases I understand, even when this question arises, it is only that the jury may decide such a question as that by the preponderance of the evidence, just as they do any other question in this court. So that if you find this young man went upon the premises, a few minutes before he was arrested, for the purpose of stealing, I do not think the defendant would be liable. But if you find that he went upon the premises for the innocent purpose which he says, then there come some other questions, and then you will be bound to look into the facts to see just what took place and where the arrest and detention were. . . .

"Now, then, a question arises right there whether or not Tholley, in doing that, was acting under the authority and by the direction, express or implied, of the defendant, or whether he was acting solely and only as the servant and agent of the police officer. I shall instruct you that if he was innocent of the crime, if he did not go on the premises for the purpose of stealing, then Tholley had no right to arrest him and detain him; and if he did it solely and only on the authority and by the direction of the defendant, then the defendant would be liable for that detention there on the street; but if he got no

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direction from the defendant's agent, Greer, specially, or if he had none generally to arrest him, but was acting solely under the direction of the officer, and had no authority from the defendant or Greer to arrest him, then the defendant would not be liable, in my opinion, under all the facts and circumstances of this case, and I shall give you on that point, I think, the instructions which I am asked to give you by the defendant, 'that if Tholley at the time of detaining the plaintiff was under the direction of the policeman Kendall, and not under the direction or control of the defendant, the defendant would not be liable for the arrest and detention by Tholley.' . . .

"If, however, you find that Tholley did not act under the control and direction of the police officer, but that he did have authority from the defendant himself or his general agent, Greer, to arrest him and detain him, and his arrest was wrongful, that is, if he was innocent of going on the premises for any felonious purpose, then I think for that arrest and detention on the street the defendant would be liable. But I do not think that the defendant would be liable for his treatment by the officers at the station, or in the lock-up after he had been taken into charge and held by the officers, and after Tholley had ceased to have any control or direction over him or in regard to his treatment."

The plaintiff then asked the judge to instruct the jury that the relation of principal and agent did not exist between Tholley and the police officer under the circumstances of this case. To which the judge replied: "No, I cannot state that. I think that is a question for the jury."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. A. McGeough, for the plaintiff.

S. L. Whipple, (*W. R. Sears* with him,) for the defendant.

LATHROP, J. There is nothing in this case to show that the defendant had anything personally to do with the arrest or imprisonment of the plaintiff, or knew anything about it. He is sought to be held liable for the acts of one Tholley, who, although an employee of the defendant, did the acts complained of, as the defendant contended, while acting under the control and direction of one Kendall, a police officer.

There are various exceptions to the exclusion of evidence

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which we are of opinion must be overruled. Some of these go merely to the question of damages, and, as there was a verdict for the defendant, these are now immaterial. *Poland* v. *Brownell*, 131 Mass. 138. *Sullivan* v. *Lowell & Dracut Street Railway*, 162 Mass. 536. *Oak Island Hotel Co.* v. *Oak Island Grove Co.* 165 Mass. 260.

What Tholley said the day after the arrest is inadmissible on two grounds. No offer of proof was made of what the plaintiff expected to prove. *McGuire* v. *Lawrence Manuf. Co.* 156 Mass. 324, 326. Further, evidence of the declarations of Tholley after the event were inadmissible to bind the defendant. *Williamson* v. *Cambridge Railroad*, 144 Mass. 148. *McKinnon* v. *Norcross*, 148 Mass. 533. *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99. This covers also the declarations of Tholley alleged to have been made in the court house on the morning of the plaintiff's discharge.

The exceptions state that the plaintiff offered to show by his mother and sister "that prior to this affair he had never been arrested nor complained of for any crime, and that he had a good reputation." This evidence, we are of opinion, was rightly excluded. In civil proceedings, evidence of this kind is, by the great weight of authority, held not to be admissible, unless the character of a party is directly in issue, as it is in actions of libel or slander, seduction, and malicious prosecution. In other cases the general rule applies that the character of a party is immaterial, and evidence of it is inadmissible, even though the cause of action is one for which a criminal prosecution might be brought, or where the offence set up in justification involves a crime. Among the numerous cases which have come before the courts may be cited the following, where this rule has been applied. Arson, or a similar statutory offence. *Schmidt* v. *New York Ins. Co.* 1 Gray, 529, 535. *American Ins. Co.* v. *Hazen*, 110 Penn. St. 530. *Thayer* v. *Boyle*, 30 Maine, 475. *Gebhart* v. *Burkett*, 57 Ind. 378. Assault and battery. *Bruce* v. *Priest*, 5 Allen, 100. *McCarty* v. *Leary*, 118 Mass. 509. *Day* v. *Ross*, 154 Mass. 13. *Porter* v. *Seiler*, 23 Penn. St. 424. *Thompson* v. *Church*, 1 Root, 312. *Givens* v. *Bradley*, 3 Bibb, 192. *Cummins* v. *Crawford*, 88 Ill. 312, 318. *Schaeffer* v. *Oppenheimer*, 9 N. Y. St. Rep. 688. Criminal conversation. *Pratt* v. *Andrews*, 4 Comst. 493. *Norton*

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v. *Warner*, 9 Conn. 172. Divorce, where a crime is charged. *Humphrey* v. *Humphrey*, 7 Conn. 116. *Lockyer* v. *Lockyer*, 1 Edm. Sel. Cas. 107. False imprisonment. *Downing* v. *Butcher*, 2 M. & R. 374. *Russell* v. *Shuster*, 8 W. & S. 308. Fraud. *Heywood* v. *Reed*, 4 Gray, 574. *Gough* v. *St. John*, 16 Wend. 646. *Potter* v. *Webb*, 6 Greenl. 14. *Simpson* v. *Westenberger*, 28 Kans. 756. Wrongful appropriation of property. *Wright* v. *McKee*, 37 Vt. 161. *Smets* v. *Plunket*, 1 Strob. 372.

The plaintiff relies, in support of his exception, on the case of *McIntire* v. *Levering*, 148 Mass. 546. But the only point decided in that case was that in an action for malicious prosecution the plaintiff was entitled, on the issue of probable cause, to show his good reputation, if this was known to the defendant. This decision followed numerous other decisions, and affirmed a well recognized exception to the general rule. We find nothing in the language used which warrants the plaintiff's contention that, in a civil action, wherever a crime is committed, the plaintiff is entitled to show what his general reputation is. *Bacon* v. *Towne*, 4 Cush. 217, which is cited in *McIntire* v. *Levering*, is also an action for malicious prosecution.

Howland v. *Blake Manuf. Co.* 156 Mass. 543, was an action for libel, which is also generally considered an exception to the general rule. The court, after citing some New York cases to the point that, if the commission of a crime is charged in the libel and the defendant offers proof of the charge, the plaintiff cannot show his previous good reputation in answer to the evidence of his guilt, refers to the case of *Downey* v. *Dillon*, 52 Ind. 442, as making a distinction between cases in which the charge sought to be proved is of the commission of a crime, and those in which the charge is of smaller magnitude. It is then said, "We are aware of no well considered cases which go further than that." We do not understand this case as intending to lay down a general rule applicable to all offences, but merely as deciding that, if reputation was admissible in an action of libel, the plaintiff had not brought his case within even the limited rule stated by the Indiana case.

The reason given for the exclusion of evidence of reputation in *Lamagdelaine* v. *Tremblay*, 162 Mass. 339, — that it was held by this court in *Howland* v. *Blake Manuf. Co.* 156 Mass. 543,

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"that on principle as well as authority evidence of good reputation is not competent to show that one is not guilty of a dishonorable or unlawful act, which is not punishable as a crime," — was an inadvertence, inasmuch as no such point was decided in the case cited, as we have already pointed out. The evidence offered was undoubtedly rightly excluded, because the case came within the general rule to exclude such evidence in civil cases, and not within any of the exceptions to the rule.

The first instruction requested was covered by the instruction given, except so far as it was qualified by what was said to the effect that the defendant would not be liable if Tholley was acting solely under the direction of the police officer. The judge could not, on the evidence in the case, rule, as matter of law, that Tholley in what he did was acting as the servant of the defendant. There was evidence that for the time being he was acting under the direction and control of the police officer. This question was properly submitted to the jury. If he was so acting, then the general master would not be responsible for his acts. *Kimball* v. *Cushman*, 103 Mass. 194. *Murphey* v. *Caralli*, 3 H. & C. 462. *Manning* v. *Adams*, 32 W. R. 430. *Murray* v. *Currie*, L. R. 6 C. P. 24. *Samuelian* v. *American Tool & Machine Co.* 168 Mass. 12, and cases cited.

The second and third instructions requested were fully covered by the instructions given.

The plaintiff was not entitled to have the fourth request for instructions given. If it had been given, the jury might have been misled. It entirely omitted all reference to the guilt or innocence of the plaintiff, which was a material factor in the case. The subject matter was sufficiently covered by the charge.

Exceptions overruled.

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JAMAICA POND ICE COMPANY *vs.* BOSTON ICE COMPANY.

Suffolk. November 11, 1896. — June 16, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Construction of Contract.

A city took A.'s property for the purpose of a public park, and granted him permission to occupy the premises until a certain date, upon condition that interest on the damages to be recovered should be waived from the date of the taking to such other date. A. then executed an indenture with B., by which A. covenanted that B. might occupy the premises in A.'s place for such time as the city had agreed or might agree with A. that they might be so occupied; and B. covenanted that he would pay A. a sum equal to six per cent per annum upon the amount of the damages sustained by A. by the taking of his property, computed from a day named to the end of any term for which the city might agree with A. that the premises might be so occupied. Afterwards the city extended the time during which A. might occupy the premises free from rent, and the damages for the taking were agreed upon between the city and A., judgment was entered for the same, and they were paid before the expiration of such time. *Held*, in an action upon the indenture by A. against B., that the indenture was not to be so construed as to add to the amount of damages determined by the judgment an estimated value of the occupation permitted by the city after the payment of the damages as the total on which the six per cent rental to be paid by B. to A. was to be computed.

CONTRACT, to recover a sum alleged to be due under the terms of an indenture executed by the plaintiff and the defendant. Trial in the Superior Court, without a jury, before *Dunbar*, J., who found for the plaintiff; and reported the case for the determination of this court. The facts appear in the opinion.

R. Stone, for the defendant.

F. E. Snow, for the plaintiff.

FIELD, C. J. On January 17, 1894, the parties to the petition for the assessment of the damages to be paid for the taking of the Prince Street property of the Jamaica Pond Ice Company, filed in court the following agreement: "Jamaica Pond Ice Company, Petitioner, v. City of Boston. In the above entitled action, it is hereby agreed that the damages sustained by the petitioner are eighty-six thousand two hundred and fifty (86,250) dollars,

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and judgment is to be entered for the Jamaica Pond Ice Company for the amount of said damage, without interest, and execution is to issue forthwith." Judgment was entered accordingly, and the amount of the judgment was paid to the Jamaica Pond Ice Company by the city of Boston on the same day. This agreement for judgment was entered into pursuant to a vote of the Board of Park Commissioners, passed on January 15, 1894, as follows: "City of Boston, in Board of Park Commissioners, January 15, 1894. Voted, that the city solicitor be authorized to settle the suits of the Jamaica Pond Ice Company against the city of Boston by agreeing to a judgment on the auditor's award in the Pond Street property case, — and for $86,250 in the Prince Street case, — and it is further agreed in the last mentioned case, that the said Ice Company is to be allowed to occupy the icehouse on Prince Street free from all claim for rent until December 1, 1894."

There was evidence that on December 24, 1892, and on January 9, 1893, the Board of Park Commissioners took the Prince Street property for the purpose of a public park. On April 24, 1893, the Board of Park Commissioners passed the following vote: "City of Boston, in Board of Park Commissioners, April 24, 1893. A communication was received from the Jamaica Pond Ice Company, requesting permission to occupy until November 1, 1894, the premises taken from said company December 24, 1892, with the rights and privileges set forth in chapter 371 of the Acts of 1892 authorizing said taking, and suggesting that such use and occupation be in lieu of the interest from the time of said taking to November 1, 1894, to which it may be entitled upon the amount of damages sustained by it by reason of said taking; and it was voted, that the privilege to occupy said premises to November 1, 1894, is conceded on condition that interest be waived from the date of taking to November 1, 1894, upon the amount of damages recovered."

On April 27, 1893, the Jamaica Pond Ice Company, as party of the second part, made an indenture with the Boston Ice Company, as party of the first part, and covenanted that "it will allow the party of the first part to use and occupy for its own benefit" both the Pond and Prince Streets properties, "in place

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of or as representing the party of the second part in such manner and for such time as said board [of Park Commissioners] have agreed or may agree with the party of the second part that the same may be so used and occupied." The Boston Ice Company covenanted as to the Prince Street property as follows: "That it will pay to the party of the second part absolutely and at all events such sum of money as equals six per centum per annum upon the amount (however determined by and between said city and the party of the second part, whether by judicial proceeding, agreement, compromise, or otherwise) of the damages sustained by the party of the second part by said taking of said Prince Street property, computed for a period beginning with said first day of April, 1893, and ending with the expiration of any term for which said board may agree with the party of the second part that said Prince Street property may be used or occupied for the purposes of the ice business, such payment to be made by the party of the first part at the end of the period for which said interest is to be computed as aforesaid, if the amount of said damages sustained by said taking of said Prince Street property shall then have been determined as aforesaid; otherwise, upon such determination of the amount of such damages."

After the present suit was brought, the Boston Ice Company paid the plaintiff the sum of $8,625, on account of the plaintiff's claim, which sum is six per cent per annum on $86,250, computed from April 1, 1893, to December 1, 1894.

The claim of the plaintiff is, that the amount of the damages on which under the indenture the six per cent per annum is to be computed should include not only the $86,250 paid to it by the city, but also the value of the occupation from January 17, 1894, to December 1, 1894, which occupation was allowed to the plaintiff as a part of the settlement. This value it estimates to be $4,513.16, which is six per cent per annum on $86,250, computed from January 17, 1894, to December 1, 1894. Six per cent per annum on this sum of $4,513.16, computed from April 1, 1893, to December 1, 1894, is $451.31, or, as stated in the report, $451.35, and the justice of the Superior Court has found *pro forma* for this sum in favor of the plaintiff, with interest from the date of the writ.

The report concludes as follows: "If said finding is warranted

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by any of the foregoing evidence which was competent, said finding is to stand, and judgment to be entered in accordance therewith; otherwise, judgment is to be entered for the defendant."

When the indenture was entered into, the plaintiff company had permission from the Board of Park Commissioners to occupy the premises to November 1, 1894, on condition that interest on the damages to be recovered should be waived from the date of the taking to said November 1. This enabled that company to let the premises to the defendant company "for such time as said board have agreed or may agree with the party of the second part that the same may be so used and occupied." The parties must have understood that under the indenture the six per cent per annum to be paid as rental would be computed upon the amount recovered as damages for the property taken, without any interest being added to the damages from the date of the taking to November 1, 1894, or to such time as the board by agreement might permit the plaintiff to occupy, even although the total amount to be paid by the city might be determined after the occupation had ceased. The parties probably had in mind the amount of the damages sustained by the taking, estimated as of the time of the taking, without any addition of interest on account of delay in determining the damages and obtaining payment for them. The ultimate agreement extended the time of occupation to December 1, 1894. This was a benefit to the plaintiff, as the defendant would be compelled to pay rental for a longer time. But the indenture cannot be so construed as to add to the amount of damages actually agreed upon and determined by the judgment against the city of Boston an estimated value of the occupation permitted by the city after the payment of the damages as the total on which the six per cent rental is to be computed. There are no words in the indenture which admit of any such construction. It is mere conjecture whether anything was allowed for this occupation in determining the damages, or what the damages recovered would have been if no such occupation had been permitted. The Jamaica Pond Ice Company has had the benefit of the use of the money paid by the city before it was compelled to give up the occupation, and has had the benefit of the occupation in the rent paid by the defendant, and although it may have been induced to agree

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upon the amount of the damages by the permission given to occupy to December 1, 1894, yet the judgment rendered in the petition must be held to fix the amount of the damages within the meaning of the indenture.

In accordance with the terms of the report, there must be judgment for the defendant. *So ordered.*

MARIETTA P. BROOKS & another *vs.* EUGENE D. BROOKS.
EUGENE D. BROOKS *vs.* MARIETTA P. BROOKS & another.

Middlesex. December 1, 1896. — June 16, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Bill to Redeem — Security of Mortgage for Subsequent Advances.

A mortgage of real estate given to secure the payment of a definite sum of money cannot be held by the assignee thereof as security for other money subsequently advanced by him to the mortgagor, in the absence of an agreement to that effect; and an indefinite understanding that the mortgagor would repay such advances from the proceeds of a sale of a portion of the land subject to the mortgage is not equivalent to such an agreement.

FIELD, C. J. This is a bill to redeem certain land from a mortgage. The answer sets up that, in addition to the amount due on the note secured by the mortgage, other sums of money have been advanced by the defendant, the assignee of the mortgage, for which it was agreed that the mortgage should be held as security. The contention is that the plaintiffs should be required to pay these sums, as well as the amount due on the mortgage note, in order to redeem, or that the bill should be dismissed. There is a cross-bill, in which the same claims are made as are set up by the defendant in his answer. The case was sent to a special master "to hear the parties, with their witnesses, in the above entitled matters, find the facts, and make a report" to the court.

The master has made an elaborate report, finding the facts, and stating the amounts which the plaintiffs should pay in order to redeem, according to several different views of the law.

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The defendant filed exceptions to this report. These exceptions were all overruled except the sixth, which was sustained, and the master's report was confirmed except as to the matters covered by the sixth exception. The sixth exception is as follows: "That the advances and payments made by said Eugene [the defendant] for taxes on said real estate, subsequent to the purchase by him of the mortgage and note, having been made by him to preserve his security under the said mortgage, and upon the request of the said parties, and for their benefit, ought to be considered as a part of the mortgage debt, and the master should have so found and certified, with a statement of the amount on the same, with the interest accrued thereon." The master in his report found the amounts advanced and paid by the defendant for taxes on the real estate, with the dates of the advances and payments, and this enabled the justice of the Superior Court to compute the total amount due for such advances and payments, with interest, so far as they were made subsequently to the purchase of the mortgage and mortgage note by the defendant.

The court entered a final decree as follows:

"This case came on to be heard upon the bill and cross-bill, and answers thereto, the report of the master, and exceptions to the same, and was argued by counsel; and thereupon, and in consideration thereof, it is hereby ordered, adjudged, and decreed that the plaintiffs are the owners of the real estate, and the defendant the owner and holder of the mortgage described in the bill and cross-bill; that the plaintiffs are entitled to redeem the premises from said mortgage upon payment of the balance due on the mortgage note, and interest according to the terms of said note, and of the amount paid as taxes by the defendant since he became the owner and holder of said mortgage, with interest upon the same.

"That the balance due upon the note, with interest to January 1, 1896, is $1,709.04; that the amount paid as taxes by the defendant, and interest thereon to January 1, 1896, is $2,085.40; and that the plaintiffs may redeem the premises from said mortgage by the payment of both said sums, namely, $3,794.44, within sixty days from the date of this decree; and if said sum shall not be paid on or before the first day of January, 1896,

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then the plaintiffs, to be entitled to redeem, shall pay interest upon said sum of $8,794.44 from said date to the time of payment.

"That, upon said payment, the defendant is hereby ordered to discharge and cancel said mortgage by a proper instrument of discharge, and that thereafter the plaintiffs may hold said premises fully discharged of said mortgage.

"And that the defendant in the original bill recover his costs to be taxed by the court; and that the cross-bill be dismissed without costs."

The defendant appealed from the order overruling his exceptions to the master's report, and from the final decree. The exceptions which were overruled relate principally to the findings of fact by the master; and the contention is that the master should have found differently. But the evidence before the master is not reported. The order of reference did not require him to report the evidence, and he has never been ordered by the court to do so, and the case was finally heard upon the report of the master. We must take the facts, therefore, as found by the master.

The mortgage was given on May 11, 1875, by Jonathan Brooks to Aaron D. Williams, to secure the payment of a note for $8,200, payable in five years from date, with interest at seven per cent. Jonathan Brooks died testate, on July 23, 1876, devising said estate to Nancy Brooks, his widow, and to Malinda Brooks and Marietta Pierce Brooks, his daughters. On July 9, 1891, Nancy Brooks died intestate, and the administrator of her estate, by license of the Probate Court, sold and conveyed her interest in the real estate to Malinda Brooks. Malinda Brooks and Marietta Pierce Brooks are therefore the owners of the equity of redemption, subject to the mortgage, Marietta owning one third and Malinda two thirds.

On July 5, 1878, Aaron D. Williams assigned the mortgage and note to Bertha F. Field, and on June 8, 1880, Bertha F. Field assigned the same to Eugene D. Brooks, the defendant. The bill was filed on August 23, 1892.

In regard to the advances and payments made by the defendant, the master finds as follows:

"In regard to said advances and payments, not by the terms

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of the mortgage secured thereby, I find the following facts. There was no written agreement, or any writing by letter or otherwise, showing that these payments made by Eugene were to be considered as secured by the mortgage. As to the payments made by Eugene prior to the purchase (June 14, 1880) by him of the mortgage, there was no agreement or understanding at the time of such payments respectively that they were to be secured by the mortgage. Before his purchase thereof it was not known, or apparently contemplated, that he would purchase the mortgage. It was claimed by Eugene at the hearing before me that it was understood between him on the one hand, and Nancy (the mother) and Malinda and Marietta (the daughters) on the other, and at the time when he took the assignment of the mortgage, that, if he would buy the mortgage, he should hold it as security for the amounts which he had advanced, or might thereafter advance, to them or either of them; but I do not find that there was any specific or definite agreement to that effect. He was a cousin to Marietta and Malinda. After their father's death, they and their mother were in want of money from time to time, to pay their expenses of living, and for the improvement of the real estate in question, and to pay the interest on the mortgage and taxes on the real estate, and for other purposes. He was in the habit of advancing them money from time to time, as stated in the account, and sometimes he gave it to one and sometimes to another, according to which of them applied for it. There was no reason for giving it to one more than another, except that he gave it to the one who came for it. Sometimes he gave money to Nancy directly, and at other times to one or the other of the daughters, taking from her or them at some times a receipt signed by Nancy, and at other times a 'borrowed and received,' or promise to pay with interest, signed by her. Some of the payments he made to Malinda, and took her receipt or promise to pay, and some to Marietta, and took her receipt or promise to pay. I do not think it necessary to classify the payments made to each, because they all come in the same category; that is to say, the cirumstances are the same as to the payments made to each. If the payments to either of them are secured by the mortgage, then all the payments are secured; if the payments are not secured by the mort-

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gage, then they are personal claims against all or some of the three women, as the case may be. There was no agreement as to any of the payments which would not apply to all; no payments were singled out as secured by the mortgage. If the payments were to be secured by the mortgage, it was by virtue of a general agreement that all the advances, past and future, were to be thus secured. There was no such specific agreement.

"While there was not what could be called an agreement definitely formulated to that effect, yet there was an understanding between the parties, as shown by their conversations, and in an indefinite way, that Eugene was to get his money when they should sell their land. The three women were desirous of laying out a street through the land, and of cutting up the land into house lots, and of realizing money from the sale thereof, which was done, and some of the house lots were sold before the death of said Nancy. No lots have been sold since her death. He, Eugene, paid taxes on the real estate and interest on the mortgage note before, and he paid taxes on the real estate after, he bought the mortgage and note, at the request of one or the other of the parties, and for their joint benefit. In brief, he advanced money from time to time to one or the other of the women, as the case might be, or for taxes or interest, or other purposes, and there was no specific agreement made as to when or how he was to be repaid. The interest, as shown by the schedules, on the advances I have calculated at six per cent, on the ground that an agreement simply that the advance should be secured by the mortgage, and there being no agreement as to the rate of interest thereon, cannot be construed as an agreement to pay more than the legal rate of interest on such advances, although a larger rate of interest is, by the terms of the mortgage, to be paid on the money originally secured thereby.

"The three women made sale of lot No. 29 for $4,000. They agreed with Eugene, in consideration of his releasing said lot from the lien of the mortgage, to pay him $2,000 of amount received by them on said sale. Eugene gave the release of the mortgage, but the three women never paid said $2,000 to him."

As the defendant has been allowed in account all the ad-

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vances and payments of money for taxes made after he became the owner of the mortgage, his argument is now confined to the advances and payments of money for taxes made before his purchase of the mortgage, and to advances and payments of money made for other purposes, both before and after that purchase. The substance of the findings of the master is that, although there was no agreement that the advances and payments made by the defendant, whether made before or after his purchase of the mortgage, should be secured by the mortgage, yet there was an understanding in an indefinite way that the defendant should get his money when the plaintiffs should sell their land. Only one agreement is found, and that is the agreement of Nancy Brooks and the plaintiffs with the defendant that, if he would release lot No. 29 from the mortgage, they would pay him $2,000 of the $4,000 which they were to receive from a sale of the lot. He gave the release, they sold the lot and received $4,000, and never paid the defendant the $2,000 promised.

The defendant relies upon *Joslyn* v. *Wyman*, 5 Allen, 62; *Stone* v. *Lane*, 10 Allen, 74; *Upton* v. *National Bank of South Reading*, 120 Mass. 153; *Taft* v. *Stoddard*, 142 Mass. 545; *Douglas* v. *Stetson*, 159 Mass. 428; and other similar cases. But the difficulty is that there never was any agreement that the mortgage should be held by the defendant as security for the advances and payments, and an indefinite understanding that the plaintiffs would repay the payments and advances when they sold the land out of the money obtained from the sale is not enough. Such an understanding, if it means anything, means that the land must be sold either discharged of the mortgage or subject to the mortgage. If the mortgage is discharged, it no longer can be held as security; if the land is sold subject to the mortgage, the purchaser takes the land subject to the mortgage, according to its terms, and it cannot be held as security for other debts unless the purchaser assents. The agreement to pay $2,000 for the release of lot No. 29 from the mortgage out of the $4,000 to be received from the sale, is not equivalent to an agreement that the mortgage should stand as security for $2,000 in addition to the amount due on the mortgage note. If they had paid this $2,000, they could have appropriated it towards the payment of what was due on the mortgage

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note. We have been shown no case where a mortgage given to secure the payment of a definite sum of money has been held to be security for a larger sum, on facts such as are found in the present case. The final decree of the Superior Court must be affirmed, the sixty days within which the plaintiffs may redeem to be reckoned from the day of the filing of the rescript of this court in the Superior Court, and interest on the sum to be paid to be reckoned up to the time of payment. *So ordered.*

H. J. Wells, for Eugene D. Brooks.

S. H. Tyng, for Marietta P. and Malinda Brooks.

ANNE KERSE *vs.* JOHN MILLER.

Suffolk. December 3, 4, 1896. — June 16, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Equity Practice — Mortgage — Right of Redemption — Decree.

An appeal from a decree of the Superior Court sitting in equity, where the evidence is not reported, raises the question whether the decree corresponds to the allegations and prayers of the bill, and with the rules of law applicable thereto.

The life tenant of a portion of an estate covered by a mortgage may redeem his interest by paying his proportional part of the mortgage debt, if the mortgagee assents thereto.

If the life tenant of a portion of an estate covered by a mortgage redeems the entire estate, he is not subrogated to the rights of the mortgagee, but is entitled to possession of the whole estate until the amount paid by him above his proportional share has been repaid to him.

A decree upon a bill in equity to redeem land from a mortgage, which directs the delivery to the plaintiff of the mortgage and note, and requires the defendant to discharge the mortgage, is erroneous.

Upon an appeal from a decree in a suit in equity to redeem land from a mortgage, where the evidence is not reported, if the decree states that the taxes for certain years paid by the defendant on a day named were not allowed in the accounting, and the defendant's answer alleges that he took possession of the property under a deed to him of the equity of redemption, and not under the mortgage, enough does not appear to show that the decree is wrong in not allowing the taxes in the account.

BILL IN EQUITY, filed in the Superior Court December 16, 1895, to redeem land in Chelsea from a mortgage. A decree

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was entered for the plaintiff; and the defendant appealed to this court. The facts appear in the opinion.

A. E. Gage, for the defendant.

C. E. Washburn, for the plaintiff.

LATHROP, J. This case comes before us on an appeal from a decree of the Superior Court sitting in equity. The only papers before us are the pleadings and the decree. The decree states that the cause came on to be heard upon evidence. The evidence is not reported, and the question is whether the decree corresponds to the allegations and prayers of the bill, and with the rules of law applicable thereto.

The facts as they appear in the bill are these. On April 13, 1866, Timothy Kerse mortgaged a parcel of land in Chelsea to the Chelsea Savings Bank. At the time the bill was brought, December 16, 1895, the plaintiff was a life tenant of four rooms in a dwelling-house on the premises, by virtue of a lease dated September 22, 1870. The defendant had when the bill was filed a threefold title; namely, a second mortgage on the entire estate, dated March 11, 1893, which in fact was subject to the plaintiff's lease, an assignment from the Savings Bank, dated August 21, 1894, of the first mortgage, and a deed of the equity of redemption, dated September 27, 1894.

On September 29, 1894, the defendant took possession of the premises, and received the rents and profits, and has continued so to receive them.

The defendant subsequently advertised the premises to be sold on December 16, 1895, under the power contained in the mortgage; and thereupon this bill was brought to redeem the first mortgage.

The first prayer of the bill is, "That an account may be taken of what is due to the defendant for principal and interest on the said mortgage." The second prayer is that an account may be taken of the rents and profits; and that what shall appear to be due to the plaintiff in taking the account from rents and profits be deducted from what shall appear to be due to the defendant for principal and interest. The third prayer of the bill is as follows: "That it may be decreed that upon the plaintiff paying to the defendant the sum, if any, which shall so be found due on the mortgage, the plaintiff shall

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have possession of the premises, which were leased to her as aforesaid, to hold the same discharged of the said mortgage." The fourth prayer is for an injunction; and the fifth is for general relief.

The decree states that the plaintiff is entitled to redeem the mortgage, and to be subrogated to the rights of the defendant in said mortgage; that the plaintiff shall pay to the defendant, within thirty days from the date of the decree, the sum of $476.27, being the principal and interest on the mortgage note, and the expenses incurred in preparing for the sale under the mortgage, with interest until the payment; that upon such payment being made by the plaintiff to the defendant, the defendant shall deliver to the plaintiff the mortgage and note thereby secured, and, at the request of the plaintiff, shall execute and deliver to the plaintiff a formal discharge of said mortgage. At the end of the decree is the following: "Taxes for 1892, 1893, and 1894, amounting to $51.50, paid by the respondent on October 10, 1894, were not allowed in the accounting."

It is not contended that the plaintiff is not entitled to redeem, as she is the owner of a life estate in a portion of the entire estate covered by the mortgage; and one question is how much she is obliged to pay.

In *Gibson* v. *Crehore*, 5 Pick. 146, where a widow of a mortgagor, claiming a right of dower, sought to redeem from an assignee of the mortgagee, who was also the owner of the equity of redemption, the question was much considered; and it was held that, while it would be equitable to allow the plaintiff to redeem a third part of the mortgaged premises, by paying her equitable portion of the mortgage debt, according to the value of her right of dower as compared with the residue of the estate, this could not be done without infringing the defendant's rights as assignee of the mortgage; and that he had the right to insist upon the payment of the entire mortgage debt. The right of a plaintiff so redeeming was declared to be to hold the whole estate mortgaged until he should be reimbursed what he had been compelled to pay beyond his due proportion. A person so redeeming must also pay his proportion of the interest.

Subsequently, the defendant in *Gibson* v. *Crehore* elected to permit the plaintiff to redeem upon payment of her proportion

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of the amount due on the mortgage; and the court allowed this course to be taken. There would seem to be no difficulty in allowing a bill to redeem by paying a proportional amount to be maintained by one owning a distinct interest, if no objection is made on this point. *Van Vronker* v. *Eastman*, 7 Met. 157.

We have some doubts whether the bill in this case can be considered as anything more than a bill to redeem the plaintiff's interest, inasmuch as the only possession asked for is that of the leased premises, whereas if she redeem the entire mortgage, she is entitled to possession of the entire estate until she has been repaid what she has been obliged to pay of the mortgage debt and interest above what equitably belongs to her to pay. But as the parties and the court below have treated the case as one to redeem the entire estate, and as the defendant may, if he sees fit, by proper proceedings allow the plaintiff to redeem by paying only her proportional share, as was done in *Gibson* v. *Crehore*, we proceed to consider the case on the theory on which it was tried.

The general principles stated in *Gibson* v. *Crehore*, which are applicable to the present case, have been approved and followed in several cases, and must now be considered the law of the Commonwealth. See *Brooks* v. *Harwood*, 8 Pick. 497; *Bacon* v. *Bowdoin*, 22 Pick. 401; *Chase* v. *Woodbury*, 6 Cush. 143; *Merritt* v. *Hosmer*, 11 Gray, 276; *Hurley* v. *Hurley*, 148 Mass. 444; *Barnes* v. *Boardman*, 152 Mass. 391, 393, 394.

The statement in the decree, that the plaintiff is to be subrogated to the rights of the defendant in the mortgage, is inaccurate. The plaintiff by redeeming the mortgage is entitled to possession of the portion of the estate in which she has a life tenancy, free from the encumbrance of the mortgage. She is also entitled to possession of the rest of the estate until the amount she has been obliged to pay over and above her proportional share has been repaid her by the rents and profits of the estate, or by the defendant in some other way.

Nor do we see any ground for that portion of the decree which directs the delivery to the plaintiff of the mortgage and note, and which requires the defendant to discharge the mortgage. The only authority cited by the plaintiff is the case of *Hamilton* v. *Dobbs*, 4 C. E. Green, 227. There the owner of

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land mortgaged it, and then let it for a term of years. It was held that the tenant had a right to redeem, and was subrogated to the rights of the mortgagee, and had the right to have the bond and mortgage delivered to him uncancelled.

We are not aware that the case last cited has been followed in this Commonwealth. In *Lamb* v. *Montague*, 112 Mass. 352, a bill in equity was brought by a man and his wife to redeem a mortgage made by them. The plaintiffs had a homestead estate in the land mortgaged, and the wife had also an inchoate right of dower subject to the mortgage. The equity of redemption in the land had been conveyed by Lamb's assignee in bankruptcy to one Smith, who was made a party defendant, but the bill was afterwards discontinued as to him, and proceeded only against the assignee of the mortgage. It was held that the plaintiffs, while entitled to redeem, were not entitled to an assignment of the mortgage. This case has been followed in *Roche* v. *Hampden Savings Bank*, 128 Mass. 115, *King* v. *Nichols*, 138 Mass. 18, 22, and *Union Institution for Savings* v. *Hill*, 139 Mass. 47, 48.

If the plaintiff is not entitled to an assignment of the mortgage, we see no reason why she is entitled to the possession of the mortgage. As to the discharge of the mortgage, which is ordered by the decree, there is no prayer for this in the bill, and it is not in accordance with our practice to order a mortgage to be discharged. The rights of the plaintiff to hold her interest in the estate free and discharged from the mortgage can be amply secured to her by a decree in proper form. When the defendant repays to the plaintiff the amount which she will have to pay to redeem the mortgage, over and above her proportional share, the defendant may need the mortgage to protect his estate, if there is any infirmity in his title.

As to the taxes for the years 1892, 1893, and 1894, paid by the defendant on October 10, 1894, we are of opinion that enough does not appear to show that the decree is wrong in not allowing them in the account. By the Pub. Sts. c. 181, § 23, it is provided: "If the mortgagee or any person under him has had possession of the premises, . . . he shall be allowed . . . for all sums paid for lawful taxes and assessments," in case a bill to redeem is brought. But the defendant in this case claimed not

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only under the mortgage, but also as owner of the equity of redemption, and he states in his answer that he took possession of the property under the deed of Kerse to him (which is the deed conveying the equity of redemption), "and did not take possession of them under said mortgage." The judge may have found that the taxes were not paid by him as mortgagee. If so, they do not belong to the account, and the decree in this respect was right. If the taxes were levied on the entire estate, and the defendant has paid more than his share of them, he may perhaps have a claim against the tenant for life. But this must be settled in some other proceeding.

The result is that the decree of the Superior Court must be reversed, and the case remitted to that court for further proceedings. If both parties agree in that court that the plaintiff may redeem by paying only her proportional interest in the first mortgage, the value of the two interests can readily be ascertained in the manner pointed out in *Gibson* v. *Crehore*, *ubi supra*, and this probably will save the parties much future litigation. If they do not so agree, a decree is to be entered in conformity with this opinion. *So ordered.*

OLIVER H. DURRELL & another, assignees, *vs.* GEORGE P. STAPLES.

Suffolk. January 21, 22, 1897. — June 16, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Promissory Note — Partnership — Insolvent Debtor.

The giving by B., without the knowledge or authority of C., who does not ratify the act, of a promissory note in the name of a firm composed of A., B., and C., in payment of a note given by A. individually for money borrowed to enable him to pay in his share of the capital of the partnership, is not within the general authority of a partner to bind his firm, and if it was not done according to the usual course of the firm's business, and no authority to use the firm's name for such a purpose was contained in the articles of copartnership, the note cannot be proved against the estate of the firm in insolvency, although the firm note was given for the purpose of preventing legal proceedings being taken to reach A.'s interest in the property of the firm.

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APPEAL from a decision of the Court of Insolvency, allowing a claim of the appellee against the insolvent estate of the firm of Ceiley and Wright, composed of Herbert H. Ceiley, Warren I. Wright, and Nathaniel D. Whitney, upon a promissory note signed in the firm name. Trial in the Superior Court, without a jury, before *Hammond*, J., who found for the appellants; and the appellee alleged exceptions. The facts appear in the opinion.

C. W. Bartlett & E. R. Anderson, for the appellee.

M. P. Beckett, (*J. H. Butler* with him,) for the appellants.

FIELD, C. J. This appeal was tried by a justice of the Superior Court, without a jury. The exceptions recite as follows: "At the conclusion of the evidence, the appellee requested the court to rule that, upon all of the evidence in the case, the claim of the appellee should be allowed against the firm assets. This ruling the court refused, but did find, as a matter of fact, and ruled as follows. The partnership articles were signed, and capital paid in, and the business entered upon and continued until several months after the date of the note in suit. The capital paid in by Ceiley was borrowed by him of Staples, who took Ceiley's individual note therefor. From time to time the payments were made by Ceiley, and the note renewed. In March, 1894, there was due Staples $8,100; he threatened to take legal proceedings to reach the interest of Ceiley in the firm, and on March 31, 1894, Staples, Ceiley, and Wright met in the office of Staples's attorneys, and it was then agreed between them there, that if $300 was paid on the claim, and the firm note given for the balance, Staples would forbear the taking of the steps threatened. In pursuance of that agreement $300 were paid Staples by the firm check, and Wright signed and delivered to Staples the note in suit, and Staples forbore on account of this. Whitney had no knowledge of these transactions, and never in any way ratified them. On these facts I rule that the note is not the note of the firm, and, having so ruled, I find for the assignees. To all these findings, rulings, and refusals to rule, the appellee duly excepted."

We have no doubt that it was competent for the justice to find on the evidence "that Whitney had no knowledge of these transactions, and never in any way ratified them," which we take to mean that, at the times when the firm notes were given,

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Whitney had no knowledge that they were given, and that he never authorized or ratified the giving of them. Whitney testified that the first he heard about either note signed in the firm's name was after the second note was given; that "he thought he heard about it a very few days, it might have been the next day, after the note of April 14 was given"; and that "he had no talk at any time with Mr. Wright or Mr. Ceiley about the firm note being given in the place of the individual note, and never assented to any firm note in any form." There is no other testimony that Whitney knew at any time before the failure and insolvency of the firm that any firm note had been given to Staples.

After the expiration of the limited partnership, Ceiley, Wright, and Whitney became general partners in carrying on the business theretofore carried on by them as a limited partnership. This firm note which Staples attempted to prove in insolvency against the firm was given April 14, 1894, for $7,700, in renewal of another note signed in the name of the firm, dated March 31, 1894, for $100 more, which had been given in payment of a note signed by Ceiley, which was the last of a succession of renewals of a note originally given to Staples by him for money borrowed on his individual account, to enable him to pay in his share of the capital of the limited partnership. Wright was induced to give the notes of March 31, 1894, and April 14, 1894, in the name of the firm, in order that Staples might not institute a suit in equity on Ceiley's note, for the purpose of reaching and applying Ceiley's interest in the firm property to the payment of Ceiley's indebtedness to him. The giving of a firm note by one partner for such a purpose is not within the general authority of a partner to bind his firm, and there is no evidence that it was according to the usual course of this firm's business. No authority to use the firm's name for such a purpose is found in the original articles of limited partnership under which, so far as there were any articles, this firm continued to do business after the expiration of the term of the limited partnership. We are of opinion that the ruling of the justice of the Superior Court on the facts found by him was right. *Chazournes* v. *Edwards*, 3 Pick. 5. *Fall River Union Bank* v. *Sturtevant*, 12 Cush. 372. *Daniels* v. *Hammond*, 154 Mass. 165. *Rice* v. *Doane*, 164 Mass. 136. *Exceptions overruled.*

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THOMAS WHITE *vs.* ALEXANDER D. WHITE.

Franklin. January 29, 1897. — June 16, 1897.

Present: FIELD, C. J., HOLMES, KNOWLTON, & BARKER, JJ.

Equity Practice — Partnership — Receiver — Insolvent Debtor — Jurisdiction — Intervention of Creditor holding Collateral Security — Order for Sale of Security — Decree.

It is within the discretion of the Superior Court, after the report of a receiver appointed in a suit in equity to dissolve a partnership has been confirmed, and his account allowed, and a dividend ordered to be paid to creditors whose claims have been allowed, to refuse to vacate a decree taking the bill for confessed against the defendant, and permit him to file an answer. Even if such discretion could in any event be revised by this court, no facts appear in this case to warrant a revision.

Upon an appeal by the defendant from a decree of the Superior Court sitting in equity, where the evidence is not reported, if the findings of fact support the decree, and negative all the objections of fact on the part of the defendant, there is nothing for him to argue before this court except that the decree could not lawfully be passed on the facts found.

The Superior Court, having taken jurisdiction of a bill in equity by one partner against another to dissolve the copartnership, and for the appointment of a receiver to collect the assets and convert the property into money and pay the debts, and having proceeded to do this without objection, is not deprived of its jurisdiction by the mere fact that it turns out that the partnership cannot pay its debts in full.

In a suit in equity to dissolve a partnership and for the appointment of a receiver, a creditor of the firm holding collateral security for his debt, consisting of a promissory note containing a power of sale, may intervene by a petition, asking that the security may be sold and the proceeds applied to the payment of his debt, and that he may be admitted to prove his claim for the residue, and an order for the sale of the security is within the authority of the court.

BILL IN EQUITY, filed in the Superior Court May 5, 1896, for the dissolution of a partnership, for the appointment of a receiver, and for other relief. From the several decrees entered in the case the defendant appealed to this court. The facts appear in the opinion.

P. D. Martin & C. F. A. Eddy, for the defendant, submitted the case on a brief.

J. A. Aiken, for the receivers.

F. L. Greene, for the plaintiff and for the Franklin County National Bank.

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FIELD, C. J. This suit is a bill in equity, brought in the Superior Court by one partner against another, praying virtually for a dissolution of the partnership, and the appointment of a receiver to get in all the debts and to take possession of the other property of the partnership, and to convert it into money under the direction of the court; and for an injunction against the defendant, restraining him from collecting any debts due to the partnership, selling any of its property, or incurring any indebtedness on its account. The bill was filed on May 5, 1896, and on May 6 a temporary receiver was appointed, and an injunction was issued, as prayed for. On May 16, 1896, a decree was entered dissolving the partnership and appointing two receivers, with the usual powers of receivers in winding up the affairs of a partnership. It is said that the decree was entered by consent, although this does not expressly appear in the papers before us. On May 27, 1896, the defendant entered his appearance in the suit by his attorneys. The first account of the receivers was filed on July 11, 1896, and on September 4, 1896, they filed their first report.

On the same day the court passed the following order: "In the above entitled suit William S. Allen and George A. Kimball, Esquires, the receivers appointed therein, having filed their first report and prayed in said report that their sale of personal property be ratified and confirmed, and that an account filed by them be allowed, and that a dividend be ordered to be paid to the creditors of the firm of White Brothers, it is ordered that the receivers give notice to all parties interested in said suit to appear before the Superior Court at Greenfield, in said county, on Saturday, September 12, A. D. 1896, at 9 o'clock, A. M., by publishing an attested copy of this notice in the Gazette and Courier, a newspaper published in said Greenfield, once before said Saturday, and by sending to all known creditors, and all counsel of record in said suit, a copy of this order as soon as may be, that all persons interested in said suit may then and there show cause, if any, why the said report should not be allowed and confirmed, the claims of the several creditors stated in said report be allowed, the said sale ratified and confirmed, the said account allowed, and a dividend ordered to be paid, as therein prayed for."

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On October 3, 1896, the notice having been published and sent as ordered, the court passed the following decree: "This case came on to be further heard upon the allowance of the receivers' first report, and the ordering of the payment of a dividend to the creditors of White Brothers, and evidence was heard by the court thereon, and counsel argued thereon, and thereupon upon consideration thereof it is ordered, adjudged, and decreed that the receivers' said first report be allowed, and the account therein mentioned be allowed, and that the same are hereby allowed; and that the claims of the creditors as stated in said report be and the same are hereby allowed; and further, that the receivers forthwith pay to all the creditors whose claims have been allowed, a dividend of forty per centum upon their respective claims, and that the receivers hold in their hands the balance as shown by their said account and report, to await the further order of the court." On the same day, namely, October 3, the plaintiff moved that the bill be taken for confessed against the defendant because no answer had been filed; and it was so ordered by the court.

On October 16, 1896, the defendant by attorneys other than those who entered an appearance for him filed the following request: "And now comes the defendant in the above cause and asks the court for leave to file an answer therein, for the following reasons, to wit: that at the time of the bringing of the plaintiff's bill, and for thirty days after the entry of said action, he had employed counsel to defend and look after his rights and interests in said case, and to perform such duties as might be required therein. Yet notwithstanding all this, said counsel so employed as aforesaid, and without any knowledge on his part, and through no fault of his, utterly failed to file an answer to the plaintiff's bill within the time required by law, as he has since learned that he should have done; whereof he prays that he may be permitted to come into court and file his answer, and that the order of this court taking the plaintiff's bill as confessed may be vacated." This request was disallowed, and the defendant appealed. The answer which the defendant desired to file denied many of the allegations of the bill.

It was for the Superior Court, at this stage of the case, to determine in its discretion whether it would vacate the decree

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taking the bill for confessed, and permit the defendant to file an answer, and even if this discretion could in any event be revised by this court, no facts have been found or evidence reported on which we could revise it. The court properly permitted the defendant to appear and take part in all matters relating to the proof of claims, the disposition of the assets, and to the accounting, as a party interested in the cause, and entitled to be heard. *Blanchard* v. *Cooke*, 144 Mass. 207.

On October 3, 1896, the defendant, by his attorneys, filed certain objections to the allowance of the receivers' report.

On September 4, 1896, the Franklin County National Bank of Greenfield filed a petition in the cause, alleging that it was the holder of a promissory note signed by the partnership, then overdue, and that it held certain shares of stock pledged to it by the partnership as collateral security for the payment of the note; and it prayed that the collateral security might be sold and the proceeds applied to the payment of the note, and that it might be admitted to prove its claim for the residue. The promissory note in terms gave authority to the bank to sell this collateral security at public or private sale at any time after the non-performance of the promise to pay the note. The court ordered a sale of the shares of stock at public auction after advertisement, and, the sale having been made, the court on September 19, 1896, entered a decree confirming the sale, and allowing the bank to prove its debt against the property in the hands of the receivers, after deducting from the amount of it the net proceeds of the sale. From this decree, as well as from the decree confirming the first report of the receivers and allowing their account entered on October 3, 1896, the defendant appealed to this court.

The justice of the Superior Court, on December 28, 1896, filed a report of his findings of fact in the matter of confirming the report of the receivers and the allowing of their account, and in the matter of the petition of the Franklin County National Bank, stating that at the time of the hearing on these matters no request was made that the evidence be reported, and that therefore the evidence could not be reported. The findings of fact by the justice support the decrees, and negative all the objections of fact on the part of the defendant. On the

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papers before us, therefore, there is nothing for the defendant to argue except that the decrees could not lawfully be passed on the facts found.

So far as we understand the brief of the defendant's counsel, the contention is, that, when it was ascertained that the partnership was insolvent, the court ceased to have jurisdiction over the plaintiff's suit. It does not appear that proceedings in insolvency have been instituted by anybody. The court having taken jurisdiction of a bill brought by one partner against another to dissolve the copartnership, and to appoint a receiver to collect the assets and convert the property into money and pay the debts, and having proceeded to do this without objection, is not deprived of its jurisdiction by the mere fact that it turns out that the partnership cannot pay its debts in full. Although we do not intend to commend the practice of administering the affairs of an insolvent partnership in equity rather than in insolvency, when the partnership is subject to our insolvent laws, yet in this case, when the bill was brought, it did not appear that the partnership was supposed to be insolvent, and the proceedings were carried on apparently without objection until after receivers had been appointed and the partnership had been declared dissolved. It does not even now appear that the partners individually are insolvent, although the firm assets are not sufficient to pay the firm debts, and therefore it does not appear that the partnership is insolvent. The method adopted in this suit, of winding up the affairs of an insolvent partnership in equity, is very common in some other jurisdictions, and cannot be said to be beyond the jurisdiction of a court in equity having general equity powers where no insolvency proceedings have been instituted. The court at the outset, if it had appeared that the partnership was insolvent, undoubtedly might have declined the jurisdiction, on the ground that the best remedy was in the Court of Insolvency.

The intervention of the Franklin County National Bank by petition was proper, and the order for the sale of the security was within the authority of the court, the bank assenting to it, although by reason of the power of sale contained in the promissory note it may be that the bank could have sold the security without an order of the court. The decree of the court on the

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petition was right. *Washburn* v. *Goodman*, 17 Pick. 519. *Amory* v. *Francis*, 16 Mass. 308. *Merchants' National Bank* v. *Eastern Railroad*, 124 Mass. 518, 524. *Franklin County National Bank* v. *First National Bank of Greenfield*, 138 Mass. 515, 518, 522. 1 Story, Eq. Jur. § 633.

The orders and decrees of the Superior Court which have been appealed from must be affirmed, with costs.

So ordered.

SAMUEL C. BURNEY *vs.* CHILDREN'S HOSPITAL.

Suffolk. March 5, 1897. — June 16, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Action by Father against Hospital for performing Autopsy on Dead Body of Child.

The father of a child, who is its natural guardian, has a right, in case the child dies, to the possession of its body for burial, and may maintain an action for an unauthorized autopsy performed on the dead body of the child.

TORT, against a hospital for causing an autopsy to be made upon the dead body of the plaintiff's child without the plaintiff's consent. The defendant demurred to the declaration, assigning as ground therefor that the matters contained therein "are not sufficient in law for the plaintiff to have his action against this defendant." The Superior Court sustained the demurrer; and the plaintiff appealed.

R. W. Gloag, for the plaintiff.

H. Wheeler, for the defendant.

LATHROP, J. The demurrer in this case is a general one, and the question presented is whether the father of a child, who is its natural guardian, and who has intrusted the child to a hospital for treatment, may maintain an action against the hospital for an autopsy performed on the dead body of his child without his consent.

The sole contention of the learned counsel for the defendant in support of the demurrer is, that the action cannot be main-

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tained, because there is no right of property in a dead body. 2 Bl. Com. 429. 3 Inst. 202.

Even in England, before a dead body is buried, while there is no right of property in it, there is a right of possession for the purposes of burial, or other lawful disposition of it. Thus in *The Queen* v. *Fox*, 2 Q. B. 246, where a prisoner in jail on execution died, and the jailer refused to deliver the body to the executors of the deceased unless they would satisfy certain claims made against him, the Court of Queen's Bench issued a mandamus peremptory in the first instance, commanding that the body should be delivered up to the executors. So in *Williams* v. *Williams*, 20 Ch. D. 659, while it was held that there is no property in a dead body, it was also held that the executors had a right to the possession of the body, and that it was their duty to bury it.

In this Commonwealth, the precise question before us has not been passed upon. It is, however, apparent from the decisions that a right of possession is recognized, which is vested in the husband or wife, or next of kin, and not in the executors.

In *Lakin* v. *Ames*, 10 Cush. 198, the defendants were sued in trespass for tearing down a horse shed. The defence was that the shed was on the public common of the town, and was erected in front of a tomb lawfully on the burying ground adjoining the common, so as to obstruct the entrance thereto, and that the first named defendant, having the legal right to open the tomb, and deposit the body of his deceased brother therein, peaceably removed the shed, doing no unnecessary damage. Liberty given by the town to a man to build a tomb was held to be a grant to the man and his heirs. The first named defendant had no legal interest in the tomb, nor had he express authority from his mother, one of the heirs of the former owner. But it was said by the court, "The law will imply a license from the nature and exigencies of the case, the relation of the parties, and the well established usages of a civilized and Christian community."

In *Durell* v. *Hayward*, 9 Gray, 248, it was held that a husband, who had buried his wife in a public burying ground, was not liable as a trespasser for removing a gravestone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another. It was said by Mr. Justice

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Bigelow: "The plaintiff had no right to erect a stone at the grave of the defendant's wife without his knowledge or consent. The indisputable and paramount right, as well as duty, of a husband, to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well known and long established usage of the community."

In *Meagher* v. *Driscoll*, 99 Mass. 281, it was held that, if the plaintiff owns the lot in which the body of his child is buried, he may maintain an action of tort in the nature of trespass *quare clausum fregit*, for the unlawful removal of the body; and, in measuring damages, the jury may take into consideration the injury to the plaintiff's feelings, if it appears that the defendant acted in wilful disregard or careless ignorance of the plaintiff's rights.

In *Weld* v. *Walker*, 130 Mass. 422, the right of a husband to bury his wife was again recognized, and it was held that, if he had not freely consented to the burial of her body in a lot of land owned by another person, with the intention or understanding that it should be her final resting place, a court of equity would permit him, after such burial, to remove her body, coffin, and tombstones to his own land.

In *Driscoll* v. *Nichols*, 5 Gray, 488, cited by the defendant, the plaintiff was a stranger in blood to the deceased. The action was in contract or tort for not carrying the dead body. The case was decided on the ground that the plaintiff had no legal interest in the dead body, by reason of which he could maintain the action against the carrier without proof of a special contract with himself. That case differs widely from the one at bar.

In Rhode Island, it is held that there is a quasi right of property in a dead body which the law will protect. Thus, in *Pierce* v. *Swan Point Cemetery*, 10 R. I. 227, 237, it is said by Mr. Justice Potter: "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one towards the dead; a

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duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may therefore be considered as a sort of quasi property, and it would be discreditable to any system of law not to provide a remedy in such a case."

So in *Hackett* v. *Hackett*, 18 R. I. 155, it was held that there was a quasi right of property in a dead body, and that, as a general rule, a widow had the primary right to control the burial of her husband, dependent however upon the peculiar circumstances of the case, or the waiver of such right by consent or otherwise.

In the case at bar there was no executor, and there could be none, as the deceased was a minor. The father, as the natural guardian of the child, was entitled to the possession of its body for burial.

Being entitled to the possession of the body for the purposes of burial, is not his right against one who unlawfully interferes with it, and mutilates it, as great as it would be if the body was buried in his lot, and was thence unlawfully removed? That an action may be maintained in the latter case, we have already seen; and we are of opinion that it may be in the former.

This is so held in a well considered case in Minnesota, where, in an action brought by a widow for the unlawful dissection of the body of her dead husband, an order overruling a demurrer to the complaint was affirmed. *Larson* v. *Chase*, 47 Minn. 307. This was followed in a similar case in New York. *Foley* v. *Phelps*, 1 App. Div. (N. Y.) 551, where the right to possession was defined thus: "The right is to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative." See also *Renihan* v. *Wright*, 125 Ind. 536; *Young* v. *College of Physicians and Surgeons*, 81 Md. 358; 19 Am. Law Rev. 251; 10 Alb. L. J. 71; 4 Am. Law Times, 127, and 3 Chicago Leg. News, 378; Perley, Mortuary Law, 26 *et seq.*

The question has not been argued by the defendant whether the nature of the hospital is such that an action against it can-

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not be maintained for the alleged illegal acts of its officers and servants, and we express no opinion upon it. Nor do we need to inquire under what circumstances an autopsy is justifiable, as this question also has not been argued. These questions can better be determined when the facts are before us after a trial of the case. All that we need now to decide is whether the objection raised by the defendant is valid or not. As we are of opinion that it is not valid, the order sustaining the demurrer and directing a judgment for the defendant must be

Set aside.

ALBERT WATTS *vs.* JAMES STEVENSON & others.
SAME *vs.* SAME & another.

Suffolk. March 5, 1897. — June 16, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Bond to dissolve Attachment — Poor Debtor's Recognizance — Evidence — Arrest — Action — Defence — Waiver.

Oral evidence is incompetent to contradict the records of a court.

It is no defence to an action upon a poor debtor's recognizance that the creditor made no attempt to find property of the debtor upon which the execution on which he was arrested could be levied before so arresting him.

The arrest of a debtor upon an execution, within thirty days from the date of the judgment on which the execution issued, is not a waiver of the right to sue, after the arrest, on a bond given to dissolve the attachment made in the action in which the judgment was obtained, but the creditor may maintain at the same time actions upon the bond, and upon a recognizance given by the debtor to relieve himself from the arrest.

TWO ACTIONS OF CONTRACT, the first being upon a bond given to dissolve an attachment, and the second upon a poor debtor's recognizance. The cases were tried together in the Superior Court, before *Blodgett*, J., who directed the jury to return a verdict for the plaintiff in each case; and the defendants alleged exceptions. The facts appear in the opinion.

P. J. Casey, for the defendants, submitted the case on a brief.

F. T. Benner, for the plaintiff.

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FIELD, C. J. The first action is against the principal and the sureties on a bond given to dissolve an attachment of property, and the second is against the principal and the surety on a poor debtor's recognizance. The principal and one of the sureties are the same in both the bond and the recognizance. The plaintiff originally brought an action against James Stevenson, the principal, and attached his property, and he gave a bond with sureties in the usual form to dissolve the attachment. The plaintiff, having recovered judgment against him, took out execution, and proceedings were had whereby the arrest of said Stevenson was authorized; he was arrested on the execution, and taken before a master in chancery, and entered into a recognizance with a surety in the usual form, and then, on May 20, 1896, made default on his recognizance.

The writ in the first action is dated June 4, 1896. The execution was issued on May 5, 1896; Watts, the plaintiff, made the affidavit required by Pub. Sts. c. 162, § 17, on May 8, 1896, before the Municipal Court for the city of Boston for Civil Business, and obtained a notice or citation from said court, returnable on May 13, 1896, which was duly served, and afterwards, Stevenson making default, a certificate authorizing his arrest was issued by said court and annexed to the execution, and he was arrested. The notice or citation and the certificate bore the test of William E. Parmenter, Esq., and the seal of the Municipal Court for the city of Boston, and were each signed, "H. R. W. Browne, Assistant Clerk." The plaintiff called the assistant clerk as a witness, who read the docket entries of said court whereon the issuing of the notice, the default, and the issuing of the certificate of arrest appeared; on cross-examination the defendants offered to prove by him that no justice of that court was present when the plaintiff made the affidavit, but that it was taken before the assistant clerk alone, and that the assistant clerk, without the direction of a justice, issued the notice or citation; but such evidence was excluded. The purpose of the defendants apparently was to show that the affidavit was taken before an unauthorized person, and then to contend that the proceedings authorizing the arrest were void, the arrest illegal, and the recognizance invalid. But it is manifest that the defendants could not by oral testimony contradict the rec-

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ords of the Municipal Court. If the records were not true, application should have been made to that court to amend them, but while the records stand they must be taken to be true.

We are not able to understand the contention of the defendants with reference to the other evidence which was excluded by the court.* It is said in the brief of the plaintiff: "The questions which the defendants offered to put to the plaintiff were all intended, apparently, to bring out evidence to the effect that the execution had not been in the hands of an officer, and that no search for chattels or lands of Stevenson had been made by the officer preliminary to the poor debtor proceedings and arrest." If this were true, it would be no defence to the action on the recognizance. *Webber* v. *Davis*, 5 Allen, 393, 397.

The remaining contentions of the defendants are, that the arrest of Stevenson was a waiver of the right to sue on the bond given to dissolve the attachment, and that the plaintiff could not maintain both actions, but must elect which he would prosecute. If on a judgment against a defendant he is arrested on the execution, and gives a poor debtor's recognizance and then makes default, the execution has performed its office, and a new execution cannot be issued against either the person or the goods and estate of the judgment debtor. It has been said that the recognizance takes the place of the execution. *Thomson* v. *Sleeper*, 168 Mass. 373. But it never has been held that in such a case the judgment has been in fact so far satisfied that any security given for the payment of it cannot be enforced.

Moore v. *Loring*, and *Moore* v. *Bruce*, 106 Mass. 455, are, we

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* The bill of exceptions contained the following statements. The plaintiff testified that he had not been paid the judgment in the original action against Stevenson, and that Stevenson had not given him, and he had not received from any source, any notice of Stevenson submitting himself to examination to take the poor debtor's oath. On cross-examination, the defendants in both suits offered to prove whether or not the plaintiff had in his own possession the execution at the time he made the affidavit, and whether at the time of making the affidavit he was accompanied by his attorney. The plaintiff objected, the judge excluded the evidence, and the defendants excepted. The plaintiff was asked, on cross-examination, if at the time he made the affidavit he knew where the execution was, and also how soon after he made the affidavit he saw the execution. The plaintiff objected, the judge excluded the evidence, and the defendants excepted.

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think, decisive of the present cases, the only difference being that in those cases the arrest was made after the expiration of thirty days from the date of the judgment and pending an action on the bond to dissolve the attachment, while in the present cases the arrest was within thirty days, and before the action on the bond was brought; but this difference, we think, is immaterial. In those cases the court say: "The bond and the recognizance are cumulative securities for the same debt. The creditor may enforce both of them by suit, to the extent and for the purpose, however, of obtaining the amount of his original judgment with interest and costs, the payment of which will be in full for his claim in both actions." Whether an action on the bond after the expiration of thirty days from the judgment could have been brought if the defendant at that time had been actually under arrest, we need not consider. He had been discharged from arrest on entering into the recognizance.

"The right to proceed against other parties who stand in the relation of sureties for the same debt is not defeated except by the actual payment of the judgment, and the creditor may proceed against different parties at the same time until that result is reached." *Tracy* v. *Preble*, 117 Mass. 4.

Exceptions overruled.

JAMES KANE *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. March 10, 1897. — June 16, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Street Railway — Due Care — Negligence — Law and Fact.

A boy ten years old was injured, while attempting to cross the street in front of his home, by stepping with his bare feet on a heated rail belonging to a street railway corporation, which was engaged in welding the ends of the rails of its road together. These ends were heated by electricity, and then welded together by a machine which was driven along the track to the joints of the rails, the pavements having been taken up and the earth excavated for a short distance on each side of the rail. It took about half an hour to cool the rails after

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heating. The rail in question had so far cooled that it was black, and there was no flag or wooden horse to notify one of any danger. *Held*, in an action against the corporation for the injury, that the questions of the plaintiff's due care, and of the defendant's negligence, were for the jury.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. At the trial in the Superior Court, before *Hammond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

P. H. Cooney, (*W. B. Sprout* with him,) for the defendant.

T. W. Coakley, for the plaintiff.

LATHROP, J. The accident in this case happened in August, 1893, and the case was tried in May, 1896. The boy testified that he would be thirteen the coming July, and this would make him a little over ten years old at the time of the accident. He was injured, while attempting to cross the street in front of his house, by stepping with his bare feet on a heated rail belonging to the defendant company. The defendant was engaged at the time in welding the ends of the rails of its road together, and it had proper permission to do so. The welding of the rails was effected by a gang of men ahead of the welding machine or engine, first taking up the pavements for a distance of about six feet in length at the joints of the rail, and excavating the dirt and gravel to the depth of about two and a half feet, and the width of about two and a half feet on each side of the rail. When the joints of the rails were thus exposed, the welding machine was driven along the track to the joints and stopped, and the end of each rail was heated by electricity, and they were welded together. The welding machine would then be driven along to the next joint, and another gang of men filled up the excavation and replaced the pavements. The surface of the street was not disturbed except at the joints of two rails, as above stated, and each rail was about thirty-three feet long. It took about half an hour to cool the rails after heating.

In addition to these facts, the only evidence as to the defendant's liability comes from the testimony of the plaintiff, which is set forth at length in the bill of exceptions. At the close of the evidence, the defendant asked the presiding judge to rule that the plaintiff was not entitled to recover, and to direct a

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verdict for the defendant. The judge declined so to rule, and submitted the case to the jury, who returned a verdict for the plaintiff; and the case comes before us on the defendant's exceptions to the refusal to rule as requested.

It appears that the accident occurred about half past nine in the morning; that the rail had then so far cooled that it was black; and that there was no flag or wooden horse to notify one of any danger. The plaintiff testified, on direct examination, that there was not anything there except the rails, and the "bricks" (meaning stones) near the rails, "the bricks holding the dirt; there was a big brick in the dirt near the rail, holding the dirt." He was then asked, "Was that all along the rail, or only in one part that the dirt and brick were piled up?" and he answered, "There was n't any dirt and brick piled up, only some dirt holding one brick up." And this, he testified in answer to another question, was at the place where he got burned. On cross-examination, he testified that he did not go over any stones.

It does not clearly appear from his testimony that he jumped across a hole on to the rail, although he admits seeing a hole when he was on the rail. Nor does it clearly appear that he climbed over a heap of stones and dirt before he was hurt.

The case is not one of a boy trespassing upon a railroad track, as in *McEachern* v. *Boston & Maine Railroad*, 150 Mass. 515. The plaintiff had a right to use the street; and we cannot say that there was no evidence of due care on his part. We are of opinion, also, that the question of the defendant's negligence was for the jury. It would have been an easy matter in some way to have guarded the welded joints until they had cooled.

Exceptions overruled.

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PERCY O. WILSON *vs.* MASSACHUSETTS COTTON MILLS.

Middlesex. March 10, 11, 1897. — June 16, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Action — Dangerous and Unboxed Machinery.

If a person of ordinary intelligence and some experience, who is employed on a machine used for hoisting bales of cotton, having levers with which to start or stop the machine, and wheels with cogs which revolve rapidly when the machine is in motion, is injured by getting his hand into the wheels while trying to grasp the lever to stop the machine, keeping his eye fixed on a suspended bale, and not looking to see where he is putting his hand, he cannot maintain an action against his employer for his injury, upon the ground that he was set to work on a dangerous machine without instruction; nor is the machine defective because the wheels are not covered.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged negligence of the defendant. At the trial in the Superior Court, before *Bishop*, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions, in substance as follows.

The plaintiff was injured by having the fingers of his right hand caught between two revolving wheels of a machine used in hoisting and piling cotton. It appeared that this machine was located in the yard of the defendant's mill, the left of the machine being very near the walls of one of its buildings, through a window of which ran a belt over the tight and loose pulleys, and the power was furnished thereby. There was a little shed built over the machine large enough to enable a man to do his work upon the machine, and open on the right hand side, which was the side towards the cotton bales. There was on the right of the machine a sloping bank, six or seven feet high. The bales of cotton which the plaintiff was engaged in raising and lowering were on the same bank, about forty or fifty feet away from the machine. There was a hydrant somewhere between the cotton bales and the place where the plaintiff stood. It was admitted that the plaintiff was a man of ordinary intelligence. The plaintiff testified that he was twenty-seven years

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of age and brought up on a farm in Maine; that he came to Lowell in 1885, and after working for a week in another mill went to work for the defendant corporation, where he continued to work to the date of the accident, December 22, 1891. He first shovelled coal for about two weeks, was then for two months a yard hand doing work in the mill yard, then a watchman, part of the time day watchman and part night watchman; during the time he was a yard hand he had nothing to do with operating machinery, but assisted to unload and take inside machinery which came to the mill; while he was night watchman he used to run a machine some, hoisting cotton that was in the storehouse. The gearing of this machine was covered or boxed, and in using it he stood in front of it instead of on the side, and the two levers of the machine were one on his right and the other on his left as he stood facing the machine; in other respects the machine was like the one upon which he was injured; when he was put to work upon the machine in the storehouse he was instructed how to run it; but he had never had any experience at work in operating any machine other than these two.

The plaintiff testified that he was set to work upon the machine on which he was injured on December 22, 1891, by the overseer and third hand; he was given no instructions how to operate it, was told to go down and run the machine; the machine was kind of down in the bank on the right side of the mill, side of the weave room down at the foot of the embankment, there was a kind of a little shed built there over it; it was a kind of dark cloudy day; there was a belt going from the speed in the mill around a pulley and out through the window to the machine in the shed; the cogs were running very fast, and there were noises, and he could not hear anything except the machine; the place where he stood was, he should think, six or seven feet from the top of the bank and forty or fifty feet away from the cotton bales which were being moved, which were also on the top of the bank; he had to watch when the men at the bales hooked on to the bales, and watch when the bales got up high enough to stop them, and when to let them down, and a hydrant intervened between the place where he stood and the cotton bales, so that sometimes they would get up so far he

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would have to kind of lean over to see when they were hooked on. The witness illustrated to the jury the operation of the machine, which was in the court room, and it appeared that when operating it he stood at the side of the machine instead of in front, and that this brought both levers in front of him instead of one on each side. In describing the manner in which he received his injury he testified that the bale was going up after having been hooked on to the top of the bale to pile it up, and he was getting hold of lever No. 2 to stop it; that he was hoisting the bale with lever No. 1, and was watching to see how the bale got up "and get hold of this, you know, to let it down after it got up, and my hand went right in there when I reached after this lever," that he had to be watching this cotton to see when it got up; and "I had to kind of look over this way" (leaning). He testified that the man at the bales called out to him when to hoist, but after that he got no orders and would have to say when the time came to stop, shift his belt by the lever, and lower; that he ran the machine, piling cotton about an hour and a half in the forenoon and about an hour and a half in the afternoon, to the time of the accident.

The defendant asked the judge to rule that, upon all the evidence, the plaintiff could not maintain his action; but the judge declined so to rule.

The judge instructed the jury that the plaintiff could not recover unless he was put to work under circumstances of peculiar danger, and was not apprised of the danger; that if an employer puts a servant to the use of machinery under circumstances which impose a peculiar risk, and the servant is inexperienced in operating machinery under such or similar risks, it is the duty of the employer to apprise the servant of the dangerous character of the undertaking in which he is about to engage; and that if the use of the machinery under the circumstances testified to by the plaintiff, and in a situation he had never worked in before, imposed a peculiar risk, arising from the fact that his attention had to be placed on the cotton as a part of his duty, and his mind was fixed upon that part of the work and was thereby distracted from the machinery and gearing, and by reason thereof the injury occurred, he might recover; to which instruction, and the refusal to rule as requested, the defendant

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excepted. In other respects the instructions given were not objected to by the defendant.

G. F. Richardson, for the defendant.

J. C. Burke & B. D. O'Connell, for the plaintiff.

LATHROP, J. We are of opinion that the request of the defendant for a ruling that the plaintiff could not maintain the action should have been given.

The plaintiff at the time of the accident was at work in one of the defendant's yards, on a machine used for hoisting bales of cotton. The machine was run by a belt, and had a tight pulley and a loose pulley. To start the machine the plaintiff stood at the side of the machine opposite the belt, with one hand on a lever, which, by pulling it towards him, would throw the belt from the loose pulley to the tight pulley. There was another lever, by the moving of which the belt would be thrown from the tight pulley on to the loose pulley. There was also a foot brake, which was used in controlling the speed, and in stopping the machinery. On the right of the plaintiff, as he stood at the machine, were two wheels with cogs, which revolved rapidly when the machine was in motion. There was a rope connected with a drum on the machine at one end, and the other end was attached to a derrick on the bank above. A cotton bale was hoisted from the same level as the machine to a point above the bank. The machine was then stopped, and the bale lowered to the place desired. There was a hydrant on the bank above, which to some extent obstructed the plaintiff's view; and, in order to see when the bale reached the desired height, he leaned somewhat to the right, and in endeavoring to catch hold of the lever to stop the machine, keeping his eye fixed on the bale, he got one hand into the cog wheels, and was injured. The levers were not on a line with the wheels, so that there was no necessity for him to reach across them, if his body had been in an upright position. There was also room, as he stood, to reach over the top of the wheels and grasp the lever. While there was evidence that it was a cloudy, dark day, yet there is no pretence that everything was not plainly visible; nor is there any pretence that the plaintiff did not know that the wheels were cog wheels, and that if he got his hands in them he would be injured.

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The plaintiff was twenty-seven years old, and was of at least ordinary intelligence. While he had not thorough experience in this kind of work, he was by no means an inexperienced man. He had worked two or three winters on a machine used for hoisting which was very similar to this, although the gears were covered; and on the day of the accident he had worked on the machine which afterwards injured him for several hours, without encountering any difficulty.

The plaintiff's contention is that he was set to work on a dangerous machine without proper instructions. But it is difficult to see what the defendant's officers could have told him which he did not already know. It was apparent that the wheels were uncovered. They were certainly not bound to tell him that if he got his hand in the cogs he would be hurt. This any child of ten would know. Nor were they bound to tell him that if, after he saw that the cotton bale had reached its proper height, he attempted to grasp the lever without looking to see where his hand was going, he was liable to be injured. This was manifest to a person of ordinary ability, and he certainly had sufficient experience to know it. *Ciriack* v. *Merchants' Woolen Co.* 146 Mass. 182. *Probert* v. *Phipps*, 149 Mass. 258. *Pratt* v. *Prouty*, 153 Mass. 333. *Tinkham* v. *Sawyer*, 153 Mass. 485. *De Souza* v. *Stafford Mills*, 155 Mass. 476. *Downey* v. *Sawyer*, 157 Mass. 418. *Richstain* v. *Washington Mills*, 157 Mass. 538. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153, 160. *Cheney* v. *Middlesex Co.* 161 Mass. 296. *Ruchinsky* v. *French*, 168 Mass. 68.

Nor do we see any evidence that the machine was defective. So far as appears, all parts of it were in perfect working order. Even if the accident would not have happened had the cog wheels been covered, this does not make the machine defective, as the defendant was not bound in law to cover them. *Sullivan* v. *India Manuf. Co.* 113 Mass. 396. *Gilbert* v. *Guild*, 144 Mass. 601. *Goodnow* v. *Walpole Emery Mills*, 146 Mass. 261. *Foley* v. *Pettee Machine Works*, 149 Mass. 294. *Murphy* v. *American Rubber Co.* 159 Mass. 266. *Hale* v. *Cheney*, 159 Mass. 268. *Stuart* v. *West End Street Railway*, 163 Mass. 391.

The accident appears to have been caused by an act of inadvertence on the part of the plaintiff in not looking when he put

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his hand out to grasp the lever. But, if there was evidence to be submitted to the jury on the question of due care on the part of the plaintiff, we do not find any evidence of a breach of duty on the part of the defendant towards the plaintiff.

Exceptions sustained.

GEORGE C. EWING *vs.* COMPOSITE BRAKE SHOE COMPANY.

Suffolk. March 12, 1897. — June 16, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Corporation — Action — Contract — Rescission.

If the stockholders of a corporation, which has ceased to do business, together with others, form a new corporation which takes the assets of the old corporation, but does not assume to pay its debts, a creditor of the old corporation cannot maintain an action at law against the new corporation, unless the latter has made a new contract to pay his debt.

If a person enters into a contract, and afterwards seeks to avoid the effect of it on any ground that will entitle him to rescind it, he must first restore what he has received.

CONTRACT, in two counts, upon a special promise and upon an account annexed. Trial in the Superior Court, before *Lilley*, J., who, at the defendant's request, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

W. R. Bigelow, for the plaintiff.

C. A. Taber, (*E. E. Kent* with him,) for the defendant.

LATHROP, J. The plaintiff was a creditor of a Maine corporation to the amount of $787. This corporation ceased to do business, and the stockholders, together with at least one other person, formed a new corporation with a different name under the laws of Massachusetts. The new corporation is the defendant in this case. It took all the assets of the old corporation except its books, but it did not assume to pay all of the debts of the old corporation, although there was evidence that one Whitcomb, who was the manager of both of the corporations,

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told the plaintiff that the new company would be liable for the debts of the old. It is obvious, however, that where a new corporation is formed, the creditors of the old corporation do not, without something further being done, become creditors of the new corporation. They have an equitable right to follow the assets of the old corporation; but they cannot maintain an action at law against the new corporation, for there is no privity of contract. To render the new corporation liable there must be a new contract made, such as will amount to a novation. See Moraw. Corp. (2d ed.) §§ 808 *et seq.*

If a new contract is made between a creditor of the old corporation and the new corporation, the latter is liable only on the new contract. In the case at bar, according to the plaintiff's testimony, the new contract which he made with the manager was that he should receive two hundred dollars in cash and five shares of the capital stock of the new corporation at the par value of one hundred dollars a share, in full payment of his claim of seven hundred and eighty-seven dollars. He received the money and a certificate of five shares of the capital stock. He now seeks to rescind the new agreement, on the ground that the capital stock of the new corporation was not fully paid in before it began business. But even if this is so, he cannot hold the new corporation for the original debt, as it never contracted to pay it, except in the manner in which the agreement has been performed.

There is an independent ground which leads to the same result. The plaintiff has tendered only the five shares of stock, and has not offered to return the two hundred dollars which he received. If a person enters into a contract, and afterwards seeks to avoid the effect of the contract on any ground that will entitle him to rescind it, he must first restore what he has received. *Drohan* v. *Lake Shore & Michigan Southern Railway*, 162 Mass. 435. *Moore* v. *Massachusetts Benefit Association*, 165 Mass. 517.

Exceptions overruled.

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ELLIS MENDELL, executor, & others, *vs.* HIRAM DUNBAR & others.

Suffolk. March 15, 16, 1897. — June 16, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & LATHROP, JJ.

Insufficient Attestation of Will.

A person who was ill in bed, and unable to leave it, signed his will in the presence of the subscribing witnesses, who thereupon withdrew to another room in the house, no part of which was visible from any part of the room where the testator remained, and there subscribed as witnesses. They then returned to the presence of the testator, and one of them, with the assent of the others, said that they had signed his will, and showed him the signatures, and he assented thereto. *Held*, that the will was not properly attested within the meaning of the Pub. Sts. c. 127, § 1.

APPEAL, by the executor of and certain legatees under the will of Eugene F. Dunbar, from a decree of the Probate Court disallowing it. Hearing before *Holmes*, J., who reported the case for the determination of the full court, in substance as follows. The testator was ill in bed and unable to leave it. He signed his will in the presence of the subscribing witnesses, who thereupon withdrew to another room in the house, no part of which was visible from any part of the room where the testator remained, and there subscribed as witnesses. They then returned to the presence of the testator, and one of them, with the assent of the others, said that they had signed his will, and showed him the signatures, and he assented thereto. The judge ruled that these facts did not satisfy the requirements of the statute, and disallowed the will. The appellants from the decree of the Probate Court appealed to the full court. If the ruling was right, the decree of the Probate Court was to stand; if wrong, the will was to be established.

J. C. Lane, for the appellants.

E. Lowe, for the appellees.

LATHROP, J. By the Pub. Sts. c. 127, § 1, to entitle a person to dispose of his estate by will, it must be signed by him or by some other person in his presence and by his express direction, "and attested and subscribed in his presence by three or more competent witnesses."

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The questions presented by the report are two. First, Was the instrument signed by the witnesses in the presence of the testator? Secondly, If not, was the subsequent action of one of the witnesses in the presence of the others, and the assent of the testator, a sufficient compliance with the statute? We are of opinion that both questions must be answered in the negative.

In *Boldry* v. *Parris*, 2 Cush. 433, it appeared that two of the witnesses to a will signed it when in another room from the testatrix, connected by an intermediate room with the one in which she was, and not in her view or hearing; and it was held that this was not in her presence, and so not a compliance with the statute.

In *Riggs* v. *Riggs*, 135 Mass. 238, the instrument was signed by the attesting witnesses at a table in an adjoining room, at a distance of nine feet from the testator. The door was open between the rooms, and the table was within his line of vision, if he had been able to look, but on account of an injury he could not turn his head to look. He could hear all that was said, and knew and understood all that was done. It was said by Chief Justice Morton: "The statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe 'in his presence'; but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence."

In the case at bar, the only fact which appears bearing upon the first question is that, after the testator signed in the presence of the subscribing witnesses, they "thereupon withdrew to another room in the house, no part of which was visible from any part of the room where the testator remained, and there subscribed as witnesses." It does not appear where they went, or whether the doors between the rooms were open or shut, or whether what was done was within hearing. The burden of proof was upon the proponents of the instrument offered for probate to satisfy the court that this instrument was signed by

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the witnesses in the presence of the testator. On the facts found, it does not appear that this was in his presence.

The second question we must regard as settled by the case of *Chase* v. *Kittredge*, 11 Allen, 49. The opinion of Mr. Justice Gray contains a full and careful consideration of the authorities; and we see no occasion to reconsider the question.

The ruling of the single justice was therefore right; and the decree of the Probate Court is to be affirmed, and the cause remitted to that court for further proceedings.

So ordered.

HENRY C. WESTON & another, trustees, *vs.* MASSACHUSETTS GENERAL HOSPITAL & others.

Suffolk. March 17, 1897. — June 16, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Devise and Legacy — Construction of Will.

A testator, by his will, gave to trustees $300,000, and directed that this sum be set apart as soon as possible, and the income thereof paid to his wife during her life. He also gave a like sum to trustees, and directed that it be set apart as soon as possible, and the income thereof paid to his daughter during her life; and after the decease of either the principal of her trust fund, "as it shall then consist," was to be paid over to certain charities. The will then provided as follows: "But if, by losses or depreciation of my property, it shall be found at my decease insufficient for the setting apart of both the trust funds in full, I direct that, if my wife should first decease, so much of her trust fund shall be then transferred to the principal of the trust fund for my daughter as will make up that deficiency of her fund. . . . The following legacies are to be paid only after full provision of income for my wife and daughter during their respective lives." The executors set apart both trust funds in full, partly in money and partly in securities, and transferred them to the trustees for the benefit of the wife and daughter. The wife died, and the securities held in trust for the daughter depreciated in value, after such transfer, so that the fund became less than $300,000. *Held*, that the daughter was not entitled to have the deficiency in her trust fund made up out of the principal of the fund which was held for the benefit of the wife during her life, before such principal was distributed among the charities named as legatees.

BILL IN EQUITY, filed September 1, 1896, by the trustees under the will of William Hilton, to obtain the instructions of the court as to the construction of the will. Hearing before

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Holmes, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

S. Lincoln, for the Massachusetts General Hospital.

T. H. Russell, for the Trustees of Phillips Academy.

A. Lincoln, for the Boston Dispensary.

H. Wheeler, for the Children's Hospital.

H. D. Hyde & W. B. Farr, for the Trustees of Amherst College and various Missionary Societies.

C. K. Cobb, for Catherine Hilton Fiske.

FIELD, C. J. William Hilton, the testator, died on December 25, 1887, and the plaintiffs are the executors and trustees under his will. By the first article of the will he gave to his wife the household furniture, etc., and directed the executors to pay her $3,000 immediately after his decease. By the second article he gave to his trustees his dwelling-house on Commonwealth Avenue, Boston, for the benefit of his wife, during her life, and after her decease for the benefit of his daughter, Catherine Hilton Fiske, during her life, with power of sale on the written request of the wife, or, after her decease, of the daughter, and of reinvestment in another dwelling-house, or in a separate trust fund for the benefit of the wife, which after her death was to be added to the principal of the trust fund thereinafter created for the daughter.

The third, fourth, and fifth articles of the will are as follows:

"Thirdly. I give to my trustees hereinafter appointed the sum of three hundred thousand dollars, to be set apart, held, and invested as a trust fund, upon the trusts following: to wit, the trustees shall, during the life of my beloved wife, pay from the income thereof the taxes, common repairs, and premiums of insurance on the Commonwealth Avenue or any substituted estate, and shall pay all the residue of income to her for her personal disposal in the manner hereinafter appointed for all payments of income from trust funds. I direct my executors to set apart this trust fund as soon as possible. If there is delay in setting it apart, I direct my executors to pay to my wife, as interest, and in lieu of the income, three thousand and six hundred dollars at the end of every three months from the day of my decease, or a proportional sum for so much of the principal as shall not be set apart, and for the time of such delay until the completion of the

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trust fund. After the decease of my wife the principal of the fund shall be appropriated in the manner appointed in the fifth article of this will.

"Fourthly. I give to my trustees hereinafter appointed the further sum of three hundred thousand dollars, to be set apart, invested, and held as a trust fund upon the trusts following: to wit, the trustees shall during the life of my beloved daughter, Catherine Hilton Fiske, pay all the income thereof to her for her personal disposal in the manner hereinafter appointed for all payments of income from trust funds, excepting such sums as the trustees, after the decease of my wife, may pay for the taxes, common repairs, and premiums of insurance on the Commonwealth Avenue or any substituted estate, as during the life of her mother. The payments of income of both trust funds shall be quarter-yearly, or at shorter periods, at the discretion of the trustees. I direct my executors to set apart this trust fund as soon as possible. If there is delay in setting it apart, I direct my executors to pay to my daughter, in manner aforesaid, as interest and in lieu of income, three thousand dollars at the end of every three months from the day of my decease, or a proportional sum for so much of the principal as shall not be set apart, and for the time of such delay until the completion of the trust fund. The income of this trust fund and of the increase thereof from the proceeds of the Commonwealth Avenue or any substituted estate, is to be paid to my daughter during her life. After her decease, if she leave issue surviving her, I give the whole principal of her trust fund, and the increase thereof, to be paid or transferred to her surviving issue, who shall take and hold the estate and property in absolute ownership. If such issue be more than one person, such of them shall take, and in such shares, as would receive the same by succession or inheritance from her if she at the time of her decease was in possession thereof as absolute owner, discharged of all trusts. If she leave no issue surviving, the trust fund with its increase as then consisting shall be appropriated as appointed in the fifth article now following.

"Fifthly. After the decease of my wife the trust fund for her, as it shall then consist, shall be applied by the trustees to the payment of the following legacies. If the principal sum has not been set apart as a trust fund, the same shall be paid by my exec-

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utors to the legatees named, and after the decease of my daughter, if she leave no issue surviving her, the trust fund for her, with its increase, as it shall then consist, or the principal sum if it has not been set apart, shall be applied by trustees or executors to the payment of these legacies. But if, by losses or depreciation of my property, it shall be found at my decease insufficient for the setting apart of both the trust funds in full, I direct that if my wife should first decease, so much of her trust fund shall be then transferred to the principal of the trust fund for my daughter as will make up that deficiency of her fund; and if my daughter shall first decease without surviving issue, so much of her trust fund shall be then transferred to the principal of the fund for my wife as will make up the deficiency of her fund. The following legacies are to be paid only after full provision of income for my wife and daughter during their respective lives, and of the principal fund for issue of my daughter, as appointed in the third and fourth articles: If the principal of the trust fund shall be insufficient to pay these legacies in full, the payments to the legatees shall be in proportion to the sums named for them in this article, to wit," etc.

Then follow legacies amounting to five hundred and thirty thousand dollars to different institutions, and to the town of Salisbury. By the sixth and the following articles he disposes of "the residue of my estate, including the residue from the principal of the trust funds."

It is agreed among other things as follows:

"The wife of the testator survived him, and died on the 27th day of November, 1895. At the time of the decease of the testator, his property was sufficient to set apart the trust funds for the benefit of his wife and daughter in full, and there was also a considerable residue of the estate which was duly paid over to the widow of the testator as his residuary legatee. In accordance with the provisions of the third clause of the will, the executors set apart the trust fund given for the benefit of the wife, Esther A. Hilton, to wit, $300,000, in certain securities and cash then held by them as executors of the will of William Hilton; and on February 23, 1888, the executors transferred and paid over to the plaintiffs, trustees under the will of the fund in trust for the benefit of the widow, Esther A. Hilton, the amount so

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set apart. The executors also, in accordance with the provisions of the fourth clause of the will, set apart the trust fund given for the benefit of the daughter, Catherine Hilton Fiske, to wit, $300,000, in certain securities and cash then held by them as executors of the will of William Hilton; and on February 23, 1888, the executors transferred and paid over to the plaintiffs, trustees under the will of the fund in trust for the benefit of the daughter, Catherine Hilton Fiske, the amount so set apart. Each of said funds, when so set apart and paid over, was of the full value of $300,000. On the 17th of April, 1888, the executors rendered their first account as executors of said will in the Probate Court, Suffolk. In this account they asked to be allowed for the sum of $300,000, set apart as the fund in trust for Esther A. Hilton, the widow, and paid over by them to the plaintiffs, as trustees under said will of the fund in trust for her benefit; and also to be allowed for the sum of $300,000 set apart as the fund in trust for Catherine Hilton Fiske, the daughter, and paid over by them to the plaintiffs, as trustees under said will of the fund in trust for her benefit. This account was duly approved and allowed on the 7th day of May, 1888. On the 19th day of March, 1888, the trustees, the plaintiffs in this case, filed their inventory as trustees of the fund in trust for the benefit of the widow, Esther A. Hilton, in which they charged themselves with the amount of $300,000 received from the executors of the will as and for this fund so in trust under said will for the benefit of the widow, Esther A. Hilton. The list of securities and cash so set apart and paid over to said trustees appear to be the same items in the executors' account and in the trustees' inventory. On the 19th day of March, 1888, the trustees, the plaintiffs in this case, filed their inventory as trustees of the fund in trust for the benefit of the daughter, Catherine Hilton Fiske, in which they charged themselves with the amount of $300,000 received from the executors of the will as and for the fund in trust under said will for the benefit of the daughter, Catherine Hilton Fiske. The list of securities and cash so set apart and paid over to said trustees appear to be the same in the executors' account and in the trustees' inventory. The plaintiffs were appointed trustees — in one case for the widow, and in the other case for the daughter — by separate letters of appointment."

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The securities held in trust for the daughter, since they were set apart and transferred to the trustees, have depreciated, so that they are now worth less than $300,000.

Since the death of the wife of the testator the trustees have sold the dwelling-house on Commonwealth Avenue under the second article of the will, and hold the proceeds thereof, amounting to over $70,000, for the benefit of the daughter, according to the provision of this article.

The claim of the daughter is that the deficiency now existing in the $300,000 trust fund held for her benefit should be made up out of the principal of the trust fund of $300,000 which was held for the benefit of the wife during her life, before this principal should be distributed among the legatees named in the fifth article. We are of opinion that this claim is without foundation. The two sums of $300,000 each, were fully set apart, held and invested by the trustees as trust funds according to the third and fourth articles of the will, and the estate of the testator was sufficient at his decease "for the setting apart of both the trust funds in full." There was no deficiency in either trust fund when they were set apart. A depreciation in the value of the trust securities after they had been set apart and the trust funds fully constituted is not within the language of the will, and the making up of any such deficiency in either fund out of the principal of the other is nowhere provided for in the will. By the fifth article, if the principal sum of the trust fund for the wife has not been set apart, then the same shall be paid after the decease of the wife by the executors to the legatees named in that article; but if the principal sum has been set apart, the trust fund, "as it shall then consist," shall be applied by the trustees to the payment of these legacies. There is a similar provision concerning the trust fund for the daughter, if she dies leaving no issue surviving her. It is only in the event that the trust funds are not set apart in full by reason of the insufficiency of the estate at the decease of the testator, that, on the death of the wife or of the daughter without issue surviving her, the deficiency in the trust fund of the survivor is to be made up from the principal of the other fund. The clause in this article which reads, "The following legacies are to be paid only after full provision of income for my wife and daughter during their respective

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lives, and of the principal fund for issue of my daughter, as appointed in the third and fourth articles," means that the principal of these trust funds shall be fully set apart and constituted, or that if there is any deficiency in setting them apart and constituting them occasioned by the insufficiency of the estate of the testator at his decease, it shall be made up from one trust fund to the other before any of the following legacies are to be paid. The clause has no application to a depreciation in the value of the trust securities after the trust funds have been set apart in full. The daughter therefore has no right to have made up out of the trust fund which was held for the benefit of the wife during her life the deficiency below $300,000 in the value of the principal of the trust fund held for her benefit under the fourth article of the will, which was occasioned by the depreciation in the value of the securities of the trust fund after they had been transferred by the executors to the trustees.

Decree accordingly.

ELLEN M. HAMMOND & another, executors, *vs.* EDWARD A. HAMMOND & others.

Suffolk. March 17, 1897. — June 28, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Will — Payments of Legacies from Capital or Income — Retention of Income by Executors to make good Payments made by Mistake.

By his will a testator gave to his wife, three sons, and a grandson each a stated sum at his decease, and the same sum annually for four years next succeeding. By a codicil he reduced the legacies to children and grandchildren, but left unchanged the legacy to his wife. In the will nothing was said as to the source from which the payments were to be made, the codicil providing that the four payments to sons and grandson after his decease "shall be made semiannual, and payable as near the middle of January and July during the four years aforesaid as shall be most convenient to my said executors," the balance of the semiannual income, if any, to be paid to his wife "in addition to the $500 aforesaid bequeathed to her." It appeared that a very large part of his property consisted of railroad bonds, on which the interest was payable semiannually on January 1 and July 1 in each year, that the income reasonably to be expected therefrom was likely to exceed the amount needed to pay these annuities after deducting the sum needed for legacies payable at his decease, and that the wife

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had an estate of her own of $12,000. *Held*, that the four payments to the sons and grandson must be made out of the income, if sufficient, and that, as the codicil said nothing about the annual payments to the wife, they must be paid from capital, and the balance of the income, if any, after the payments to the sons and grandson, were given to her in addition to the annual payments of $500.

Where executors made payments by mistake to the wife of the testator of the whole income, thus throwing the burden of the payments to the children upon capital, and diminishing a fund which belonged to others, the court said that it was proper that she should make the loss good, and to that end the executors were authorized to retain income to make good the payments so made by them.

BILL IN EQUITY, by the executors of the will and codicil of Edward L. S. Hammond, to obtain the instructions of the court as to whether certain legacies were to be paid out of the income or out of the principal. Hearing before *Barker*, J., who, at the request of the parties, reserved the case for the determination of the full court upon the bill and answers. The facts appear in the opinion.

A. Blume, for the plaintiffs, read the papers in the case.

A. Hemenway, for the widow.

J. Fox, for the defendants.

KNOWLTON, J. The eighth clause of the will is as follows: "In addition to the aforesaid bequests, payable at my decease as aforesaid, I give unto said wife, sons, and daughter in law Elizabeth M. Hammond, as guardian of my grandchild Walter Edward Hammond, for each of the four succeeding years the following sums, to be paid to them in annual payments and as follows: to my wife Ellen M. Hammond as aforesaid the sum of five hundred dollars, to my son Walter W. Hammond as aforesaid the sum of one thousand dollars, to my son Edward A. Hammond as aforesaid the sum of four hundred dollars, to my son Henry D. Hammond as aforesaid the sum of three hundred dollars, to my daughter in law Elizabeth M. Hammond as guardian of my grandson Walter E. Hammond aforesaid the sum of three hundred dollars, making the total amounts of said payments during the said term of four years ten thousand dollars, the interest on any portion of same accruing during said term shall be paid to my wife Ellen M. Hammond aforesaid annually should she live and remain my widow, the same conditions to be understood in regard to all the aforesaid gifts to my wife Ellen M. Hammond as aforesaid."

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By a codicil the testator reduced each of the legacies to his children and to his grandchild so that the aggregate amount payable to them was $5,500 instead of $10,000, and left unchanged the amount of the legacy to his wife. Each child and the grandchild was to receive a stated sum payable at the decease of the testator, and the same sum annually for the four years next succeeding. In the original will nothing was said in regard to the source from which these payments were to be made. In the codicil he made a provision as follows: "And I also will that the aforesaid four payments after my decease shall be made semiannual, and payable as near the middle of January and July during the four years aforesaid as shall be most convenient to my said executors; and after said payments, if there should be left a balance from my semiannual incomes, the same shall be paid to my wife Ellen M. Hammond, if living and unmarried, in addition to the $500 aforesaid bequeathed to her." The codicil supersedes the original will so far as it is inconsistent with it. If the original will stood alone, it would not be clear whether the income or a part of it would be applicable to the payment of these annuities. Nothing being stated in regard to the source from which these payments should be made, it might be held that they would be taken from the principal, and that the entire income of the estate, after first reserving enough to pay these annuities and the legacies payable at the decease of the testator, would be paid to the widow. Whether that would be so or not, the testator saw fit to make a special provision in his codicil in regard to these payments. He directed that they should be made semiannually, near the middle of January and July, during the four years. It is a significant fact that the schedule of his personal estate, which is made a part of the case, shows that a very large part of his property consisted of railroad bonds, on which the interest was payable semiannually on the first days of January and July in each year. According to the schedule, this property amounted to nearly $35,000, and the income reasonably to be expected from it, according to the rates shown in the schedule, was such as would be likely to exceed the amount needed to pay these annuities, after first deducting the sum needed for the legacies which were payable at his decease. The only contention against

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the payment of these annuities out of the income is, that the original will should be so construed as to give the income to the wife of the testator. But by the codicil the wife is to be paid from the testator's "semiannual incomes" only the balance, if any, after the payment of these annuities. This balance is expressly stated to be "in addition to the $500 aforesaid bequeathed to her." This implies that until these legacies are paid she is to have only the $500 per year and the balance of the income, if any. In this connection it is to be noticed that she had an estate of her own amounting to about $12,000, and that while he left three sons and a child of a deceased son, she is to have all the income of his estate for life, as soon as these legacies are paid.

Even if there were no express provision in regard to payment, the division of the legacies to each of his children into five equal parts, one to be paid in each year, would be an indication that they were to be paid from income, rather than from the principal of his estate. In *Cummings* v. *Cummings*, 146 Mass. 501, it was said that "the very nature of an annuity suggests, when those charged with the payment of it have in their hands a fund producing income sufficient to pay it, that the payment should be made from the income, and not from the principal." See also *Treadwell* v. *Cordis*, 5 Gray, 341, 351.

A majority of the court are of opinion that the four payments to the sons and grandson should be made out of the income, if that is sufficient. The codicil says nothing about the annual payments to the wife of the testator, and these must be paid from the capital. The balance of the income, if any, after the payments to the children and grandchild, is given to her in addition to the annual payments of $500.

The executors are entitled to retain income to make good the payments which they have made to the wife by mistake. As she was receiving the whole income, and thus was throwing the burden of the payments to the children upon capital, and diminishing a fund which belonged to others, it seems proper that she should make the loss good. *Livesey* v. *Livesey*, 3 Russell, 287. *Dibbs* v. *Goren*, 11 Beav. 483. See *Crocker* v. *Dillon*, 133 Mass. 91.

So ordered.

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BENJAMIN D. WASHBURN *vs.* ARTHUR I. BRADLEY.

Suffolk. March 12, 1897. — June 29, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Broker's Commission — Finding — Action.

A finding for the plaintiff in an action tried without a jury will stand, if supported by any fair view of the evidence, and not shown to have been affected by any error in law.

If a broker is employed by the lessee of a building, who desires to be released from his tenancy, to procure a customer to engage to take a new lease on terms assented to by the lessee and the lessor, and secures such a customer, who enters into a covenant to take a lease, and afterwards declines to execute the lease owing to incorrect statements, made by the lessee to him before signing the covenant, as to the duration of a sublease, the broker may maintain an action against the lessee for his commission.

CONTRACT, to recover a broker's commission. Trial in the Superior Court, without a jury, before *Hardy*, J., who found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

J. F. Wiggin, (*B. M. Fernald* with him,) for the defendant.

W. N. Buffum, for the plaintiff.

BARKER, J. As the case was tried without a jury, the finding for the plaintiff, if supported by any fair view of the evidence, and not shown to have been affected by any error in law, will stand.

The defendant was lessee, at an annual rent of $7,300, of a building in Boston which he sublet, and about four years of his term were unexpired. Wishing to be freed from his tenancy he availed himself, upon terms which were in dispute, of the plaintiff's services as a broker. The plaintiff found a firm willing to become lessees of the building for ten years at an annual rent of $6,000, and obtained from the firm the covenant set out in the declaration,* and which was verbally accepted by the defendant, who

* The material part of this covenant, which was signed by Clarence H. Knight for the firm of Mills, Knight, and Company, was as follows: "For value received we hereby agree to make a lease for ten years from the first day of September, eighteen hundred and ninety-six, of the building at the

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arranged for his own release by the owner upon payment of $1,550. The owner assented to the terms proposed, prepared a lease accordingly, and gave it to the defendant to take to the proposed lessees. They did not execute it, asserting that the defendant had misinformed them as to the time when the subleases would terminate. Negotiations for the removal of this difficulty continued for some days between the defendant and the proposed lessees, when one of the subtenants took a ten years' lease of the building from the owner at an annual rent of $6,000, and the defendant was released from his own tenancy upon his payment to the owner of the $1,550.

The evidence is not stated in full, nor is it said that all material evidence is given. It appears that the testimony of the plaintiff and that of the defendant was conflicting, both as to the terms of the plaintiff's employment and as to subsequent occurrences, and also that there was a conflict of testimony between the defendant and one of the proposed lessees as to what statements were made by the defendant as to the subleases before the making of the covenant. The evidence would justify a finding that, if the plaintiff produced a suitable customer willing and ready to become lessee on terms satisfactory to the owner and to the defendant, it was the defendant's concern to procure the cancellation of his own lease, which must of course be extinguished before the new lease could be made, and also that the reason why the plaintiff's customers did not execute the new lease was that the defendant had misinformed them as to the duration of the subleases.

The evidence would justify a finding that the defendant agreed to pay a full commission if the plaintiff should induce a satisfactory customer to engage to take a new lease on terms assented to by the defendant and the owner of the building, and also a finding that the plaintiff had performed that service. That

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corner of Congress and Purchase St., at an annual rental of $6,000, all taxes and insurance, ($6,000) Dollars, to be paid, and we also agree to pay all water rates, taxes, and insurance to which the said premises shall become liable during the term of lease. Also a vault to be fitted under the sidewalk for the storage of plates, for which we agree to pay an additional rental of 6% of cost per fitting."

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the presiding justice made these findings is fairly to be inferred from his rulings, and from the finding for the plaintiff.

It is true that, as asserted in the defendant's requests,* there was no evidence that the plaintiff's customer became a tenant or took a lease of the building, nor that the owner was ever bound to become a party to such a lease. But whether, in law, the plaintiff could recover without proof of those facts, or without proof that his customer after making the covenant was willing and offered to execute a lease in accordance with it, as the defendant asked the court to rule, must depend upon the terms of the plaintiff's employment, and upon whether, if he was employed generally to negotiate a lease, the failure of his customer to become lessee, after having covenanted so to do, was due to the defendant's own fault in having made incorrect statements as to the duration of the subleases. Whether the covenant was insufficient under the statute of frauds was immaterial, if the proposed tenant's omission to perform the covenant was not for that reason, but because of the defendant's own fault. See *Holden* v. *Starks*, 159 Mass. 503. Upon the evidence, the presiding judge was not required to give the rulings requested by the defendant, and was justified in ruling and finding as he did.

Exceptions overruled.

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* The rulings requested were as follows:

"1. The plaintiff cannot recover commission without proof either of the making of a lease to Mills, Knight, and Company, or of the making of an agreement, which bound both the Boston Real Estate Trust Company [the owner of the building] and Mills, Knight, and Company to become parties to a lease of the premises described in the declaration.

"2. The evidence in the case does not warrant either finding.

"3. The plaintiff cannot recover without proving that Mills, Knight, and Company were willing and offered to execute a lease in accordance with the agreement set out in the declaration, without qualification or condition."

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COMMONWEALTH *vs.* JAMES H. LANGLEY.

Suffolk. May 21, 1897. — June 29, 1897.

Present: FIELD, C. J., HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Obtaining Property by False Pretences — Indictment — Motion to Quash — Defence — Evidence.

A motion to quash an indictment, the objections stated in which are general, and not assigned specifically, as required by Pub. Sts. c. 214, § 25, is rightly overruled.

It is no defence to an indictment for obtaining property by false pretences that the title to such property, which came into the defendant's possession as treasurer of a corporation, did not pass to himself, but to the corporation.

At the trial of an indictment for obtaining property by false pretences, evidence that the money obtained by the defendant's fraud was disbursed by a corporation of which he was treasurer, and that he personally received no benefit from it, is incompetent.

INDICTMENT, in five counts, under Pub. Sts. c. 203, § 59. The first count was as follows:

"The jurors for the Commonwealth of Massachusetts, on their oaths, present that James H. Langley, of Boston aforesaid, on the eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-six, at Boston aforesaid, with intent to cheat and defraud one James N. Clifford, and with the view and intent, by means of the false pretences and representations hereinafter set forth, to obtain and get into his, said Langley's hands and possession the goods and chattels of the said Clifford, hereinafter mentioned, did then and there unlawfully, knowingly, and designedly make certain false and fraudulent statements, pretences, and representations concerning the 'National Contract and Supply Company,' a corporation legally established and existing, of which said corporation he, the said Langley, was then and there an officer, to wit, the First Vice President; that is to say, the said Langley did then and there, unlawfully, knowingly, and designedly, falsely pretend and represent to the said Clifford that fifteen hundred and fifty shares of the capital stock of said corporation had then been subscribed and paid for; that said corporation then had a cash working capital of between eighty

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thousand dollars and ninety thousand dollars; that between eighty thousand dollars and ninety thousand dollars in cash had been paid into the treasury of the said corporation; that of said sum so paid in, as aforesaid, fifty thousand dollars was then held and deposited by and with Rufus G. Fairbanks and Alfred R. Goodrich, as trustees, as a guarantee fund for the performance of contracts that might thereafter be made by said corporation; that said corporation had theretofore purchased, and then owned, a factory and building in Brattleborough, in the State of Vermont; that said corporation had paid for said factory and building a sum of money somewhat less than twenty thousand dollars; that said corporation had theretofore ordered machinery to be made for use in said factory and building for the manufacture of undertakers' supplies; that one George C. Bonney had bought fifty shares of said capital stock of said corporation, and had paid said corporation therefor the sum of twenty-five hundred dollars.

"And the said Langley then and there asked and requested the said Clifford, in consideration of said false and fraudulent pretences, and each thereof, to subscribe as a co-associate member of said corporation, and for fifty shares of the capital stock of said corporation; and to pay therefor to him, the said Langley, the sum of twenty-five hundred dollars, said subscription and said payment of said sum to be made by him, the said Clifford, upon the agreement, understanding, and condition that the said Clifford should thereafter be retained and elected a director of said corporation, and Second Vice President of the same, and that he should have the supervision and management of the 'Provident Savings Department' of said corporation in New England, being provided with an office and necessary clerical assistance, and receiving, in addition to necessary business travelling expenses, a salary of one hundred and fifty dollars per month for the first three months that he, the said Clifford, should serve as such Director and Second Vice President with the supervision and management as aforesaid; which said salary should thereafter be increased to the rate of twenty-five hundred dollars per year for the first year from the date of said subscription, and not less than three thousand dollars per year for any succeeding time.

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"And the said Clifford then and there believing the said false representations and pretences, so made as aforesaid, by the said Langley, and being deceived thereby, was induced by reason of the false pretences and representations, so made as aforesaid, to subscribe, and did then and there subscribe, upon the conditions aforesaid, as a co-associate member of said corporation, and for fifty shares of said capital stock of said corporation, as aforesaid, which said shares were thereafter to be issued to said Clifford by said corporation, and to pay and deliver, and did then and there pay and deliver upon the conditions aforesaid, to the said Langley, for and in exchange therefor, one check and order for money for the amount and of the value of twenty-five hundred dollars, one piece of paper of the value of twenty-five hundred dollars, of the property, moneys, goods, and chattels of said Clifford, which said check and order for money, and said piece of paper, the said Langley did then and there receive and obtain; and the said Langley did then and there receive and obtain the said property, moneys, goods, and chattels of the said Clifford by means of the false pretences and representations aforesaid, and with intent to cheat and defraud.

"Whereas, in truth and in fact, fifteen hundred and fifty shares of the capital stock of said corporation had not then been subscribed and paid for, so as aforesaid, but many less shares had then been subscribed and paid for. And whereas, in truth and in fact, the said corporation did not then have a cash working capital of between eighty thousand dollars and ninety thousand dollars, so as aforesaid; and whereas, in truth and in fact, so large a sum as between eighty thousand dollars and ninety thousand dollars in cash had not been paid into the treasury of said corporation, so as aforesaid; and whereas, in truth and in fact, of said sum so paid in, as aforesaid, as large an amount as fifty thousand dollars was not then held and deposited by and with said Fairbanks and said Goodrich, as trustees, as such guarantee fund, as aforesaid; and whereas, in truth and in fact, said corporation had not theretofore purchased, and did not then own, a factory and building in Brattleborough, in said State of Vermont, so as aforesaid; and whereas, in truth and in fact, said corporation had not paid for said factory and building a sum of money somewhat less than twenty thousand dollars, or any sum

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whatever, so as aforesaid; and whereas, in truth and in fact, said corporation had not theretofore ordered machinery to be made for use in said factory and building for the manufacture of undertakers' supplies, so as aforesaid; and whereas, in truth and in fact, said George C. Bonney had not bought fifty shares of said capital stock of said corporation, and had not paid said corporation therefor said sum of twenty-five hundred dollars, or any sum whatever, so as aforesaid. All of which the said Langley then and there well knew.

"And so the jurors aforesaid, upon their oath aforesaid, do say that the said Langley, by means of the false pretences aforesaid, unlawfully, knowingly, and designedly, did then and there receive and obtain from said Clifford the said property, moneys, goods, and chattels of the said Clifford with intent to defraud, against the law, peace, and dignity of said Commonwealth, and contrary to the form of the statute in such case made and provided."

The second and third counts are not material to be stated; and the fourth and fifth counts contained allegations similar in form and substance, although recited with less detail, to those in the first count, the name of the person alleged to have been cheated being Lothrop J. Wilder in the fourth count and Charles H. Goodwin in the fifth count.

In the Superior Court, before the jury were impanelled, the defendant moved to quash the indictment, "for the reasons that, as applied to each and every assignment in each and every count of the indictment, there is no offence formally, substantially set forth; that, as applied to each assignment in said indictment, it is wanting in due precision, wanting in certainty; and that there is no offence against the law set forth in said indictment." *Wardwell*, J., overruled the motion; and the defendant excepted.

At the trial, there was evidence that, before the dates named in the indictment, the defendant and others had caused a corporation to be formed under the laws of the State of Vermont, under the name of the National Contract and Supply Company, which corporation was to engage in the business of selling territory and rights in a scheme for the burial of the dead by payments on the instalment plan, and the manufacture of undertakers' supplies; that the defendant, with others, went to Ver-

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mont, and had a meeting at Bellows Falls, for the purpose of forming a corporation, to be named the National Contract and Supply Company, to carry on the business of burying the dead, etc., at which only the defendant took any active part; that the scheme was originated and owned by him; and that, at the meeting to organize the corporation, all the votes, declarations, statements, and agreements therein entered into were done and performed, devised, dictated, and outlined by the defendant.

There was also evidence that the defendant was treasurer and vice president and a director of this corporation at and before the time complained of; that he owned most of its stock, and managed its business and affairs, and put in most of the property owned by it; that the offices, except those held by Langley and Clifford, were filled by the former and persons to whom he gave stock; that he was the person who dealt with those named in the indictment and others, and was in the direction and control of the affairs of the corporation; that the corporation had a place of business in Boston, and had filed with the commissioner of corporations in this Commonwealth a statement and power of attorney, as required by the law regulating foreign corporations; that the money mentioned in the indictment was paid to the defendant by his direction and at his solicitation, he receiving the money as described in the indictment, and signing for the money as treasurer of the corporation; that the only property owned by the corporation at the time of its incorporation was an option for the purchase of certain real estate in Vermont, which the testimony tended to show had no value, and which option had expired; that the company also had an abstract of title showing the dispositions and chain of title of certain lands in Kentucky, which lands, the defendant testified, he owned and controlled; and that he had caused a deed of that property to be made to the trustee described in the indictment, but he had never delivered the same.

The evidence for the government tended to show that all of the defendant's acts were pretences to enable him to obtain the money of the persons named in the indictment.

A check for the payment of $2,500, as described in the first count, was payable to the order of the National Contract and Supply Company, and the same was received by the defendant, and collected by him as its treasurer.

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There was evidence that, immediately after Clifford paid the sum of $2,500, for which he received an assignment of certain territory and certain shares of stock, he was elected a member of the board of directors of the corporation; and that he attended the meetings of the board of directors until some time in August, 1896. The defendant, who testified in his own behalf, produced what was said to be the cash-book of the corporation, and, after testifying that it was in his handwriting, was asked the following question: "Now, using the book as a memorandum, tell the jury what was done with the money you received?" This question was objected to, and excluded; and the defendant excepted. The defendant was then asked as follows: "Now, you can tell, in a general way, without the use of the book, what was done with the money you received, as treasurer of the corporation, from these complainants, Goodwin, Wilder, and Clifford." This question was objected to, and excluded; and the defendant excepted.

The answer would have been that all the moneys received from the complainants by the defendant as treasurer of the corporation had been disbursed by the corporation by the direction of the board of directors; but there was no offer to show that Wilder received back any part or the whole of the money, and the testimony was that no part of it was ever received back by Goodwin.

The defendant asked the judge among other things, to instruct the jury as follows:

"1. If the defendant acted as an officer or agent of the National Contract and Supply Company in the transactions alleged in the indictment between the defendant and Clifford, Wilder, and Goodwin, respectively, he cannot be held personally criminally responsible for any representation set forth in any count of the indictment.

"2. If the money of Clifford, Wilder, and Goodwin, respectively, was paid for stock in the company, and they became officers or members of the corporation, and continued to act with and for the corporation, and the money went into the treasury of the corporation, and debited to the use and benefit of the corporation, they respectively cannot be said to have parted with this money, or that any money was obtained from them, respectively, by the defendant."

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The judge refused to give such instructions; and the defendant excepted.

The jury returned a verdict of guilty upon the first, fourth, and fifth counts only; and the defendant alleged exceptions.

G. E. Curry & P. J. Sondheim, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

BARKER, J. 1. The motion to quash was rightly overruled. The objections stated in it were general, and were not assigned specifically, as required by the statutes. See Pub. Sts. c. 214, § 25; *Commonwealth* v. *Sholes*, 13 Allen, 554; *Commonwealth* v. *Intoxicating Liquors*, 105 Mass. 176; *Commonwealth* v. *Murray*, 135 Mass. 530; *Commonwealth* v. *Jenks*, 138 Mass. 484. Besides this, the indictment was good.

2. The defendant contends that he was not guilty, because the title of the property out of which he cheated the persons whom he defrauded by his false pretences, and which so came into his possession as treasurer of the corporation, did not pass to himself but to the corporation. It was not necessary to allege or prove that he got the property on his own account, or that he derived or expected to derive personally any gain. *Commonwealth* v. *Harley*, 7 Met. 462. An intent to defraud, accompanied by the actual commission of a fraud, by means of the false pretences used for the purpose of perpetrating it, constitutes the offence. *Commonwealth* v. *Drew*, 19 Pick. 179, 182. *Commonwealth* v. *McDuffy*, 126 Mass. 467. If, by the use of false pretences, one is defrauded by being induced to part with his possession of property, and to confide it to the defendant, when he would not otherwise have done so, the defendant is guilty of the offence. *Commonwealth* v. *Coe*, 115 Mass. 481, 502.

A person who is an officer of a corporation must answer personally for the crimes which he commits while acting in his official capacity, where the wrong is done to third persons for the benefit of the corporation, as in the more ordinary case where the wrong is done to the corporation for the benefit of himself. *Commonwealth* v. *Moore*, 166 Mass. 513. In the present case there was no allegation that the defendant intended to acquire the property for himself, but only to obtain and get it into his hands and possession. Aside from some possible question of

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variance this was enough, and no question of variance was raised at the trial or argued here.

3. The remaining contention made by the defendant's brief is, in substance, that evidence that the money obtained by his frauds was disbursed by the corporation, and that he personally received no benefit from it, was competent in his defence. So far as this contention is founded upon the theory that the offence was not committed unless he intended to get the title to the property in himself, or to personally get pecuniary benefit from it, it is disposed of by what has been said above. So far as such evidence might have tended to show the defendant's true intent, he cannot complain that it was excluded. The subsequent disposition of the money by the corporation was no part of the transaction which constituted his crime. That transaction closed with his obtaining the possession of the money by means of his false pretences. If the Commonwealth had contended that the corporation was a sham or a fiction, evidence of what became of the money might have tended to throw light upon that subject. But the indictment alleged, and the government proved, the existence of the corporation. The disposition of the money by it was a subsequent fact, not part of the transaction itself. So far as others than the defendant may have acted in the disposal of the money by the corporation, it was the act of third persons; and while the defendant's own acts in that regard might be used against him, he could not make evidence in his own favor, outside of the transaction itself.

These are all the questions argued on the defendant's brief.

Exceptions overruled.

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BOYD EWING, receiver, *vs.* LIZZIE P. KING, administratrix.

Suffolk. December 7, 1896. — September 8, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Authority of Receiver of Foreign Corporation to Sue — Special Statute of Limitations — "Culpable Neglect."

Where the question of the right of a receiver of a foreign corporation to sue was not raised upon the demurrer or presented in argument, the court said that from the statements that the notes and account on which the claim was founded were "among the assets which came into the hands and ownership of the plaintiff as such receiver," and that he prevailed in all stages of a suit on the same claim against the defendant's intestate in the United States courts, the defendant's intestate having had personal service, having appeared by counsel, and having sworn to the answer personally, and the plaintiff having had no notice of the death of the defendant's intestate until after the final decree was entered, it might fairly be inferred that as receiver he became assignee of the assets.

Where a bill in equity was brought under Pub. Sts. c. 136, § 10, against an administrator more than two years after his giving bond on a claim founded on notes and an account, the court said that it was not important to determine whether a suit on the same claim brought in the United States courts, the defendant's intestate having had personal service, having appeared by counsel, and having sworn to the answer personally, and the plaintiff having had no notice of the death of the defendant's intestate, until after the final decree was entered, was void or merely voidable, since the bill told in general language the whole story of the plaintiff's claim and asked for payment of it, without reference to the question whether it was legally presented by the notes and account, or by a judgment in which they were merged.

If the averments of a bill in equity brought under Pub. Sts. c. 136, § 10, by a receiver of a foreign corporation against an administrator, are true, — that the plaintiff was not a creditor who waited quietly and carelessly for more than two years after the death of his debtor in this Commonwealth when he had no other plan for the recovery of his debt than to seek the debtor at his domicil; that by service of process upon his debtor he had brought him within the jurisdiction of the Federal Court in his own district and was pursuing him there; that the debtor had appeared in court by counsel, and had made an answer which he had sworn to in person; that the plaintiff had prevailed in the Federal Courts, including the Supreme Court of the United States on appeal; that no suggestion had come from any source that the defence, which was all the time being conducted in the name of the defendant's intestate and others, was not in fact conducted by him as well as by his co-defendants, and the defendant at the time of his appointment as administrator was cognizant of the proceedings in court, and from that time until the entry of judgment employed counsel to represent the interests of the estate of his intestate in the litigation, — the claim may be prosecuted as it would have been if the plaintiff had learned of the death of his debtor, and had brought suit against the administrator within two years after his appointment.

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BILL IN EQUITY, filed in this court October 14, 1895. The bill alleged that the plaintiff, a resident of Chattanooga, Tennessee, was in the year 1891 appointed by the United States Circuit Court for the Eastern District of Tennessee, receiver of the Cardiff Coal and Iron Company, a corporation duly organized under the laws of Tennessee; that he was duly qualified as such receiver, and had ever since held that office; that among the assets which came into the hands and ownership of the plaintiff as such receiver was a book account for $1,000, and two notes, each for $4,275, dated April 24, 1890, both signed by Stillman B. King as trustee, and both payable to the order of the Cardiff Coal and Iron Company; that upon the second of these notes partial payments of principal, amounting to $3,100, were made during the year 1890, leaving $1,175 due upon principal; that each note stated that it was "given in part consideration for land this day bought of the said Cardiff Coal and Iron Company, and a lien is retained on said land to secure the payment of this note"; that King, as the plaintiff was informed and believed, and therefore averred, in making the notes and in purchasing the land for which they were given, was acting as trustee or agent for certain persons, but for what persons the plaintiff was not informed; and that, by making and delivering the notes in the manner and form in which they were made, he became personally liable for the payment thereof; that on or about August 1, 1891, the plaintiff brought suit in the United States Circuit Court for the Eastern District of Tennessee against King to enforce the payment of the notes; that personal service of process was duly made upon him within the district and jurisdiction of said court, and he appeared by counsel, and filed an answer which was sworn to by himself personally; that the suit was also brought against a large number of other persons, who had bought land of the company, and given their notes in payment of the same; that it was contested by King and the other defendants, not only in the United States Circuit Court for the Eastern District of Tennessee, but also in the United States Circuit Court of Appeals and in the United States Supreme Court; that at all stages of the suit the plaintiff prevailed against King and the other defendants, and finally, on September 3, 1895, obtained a final decree against him for the sum

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of $9,488.10 debt, and the costs; that at no stage of the suit was the death of King suggested by his attorneys, or by the present defendant, or by any one else, and it was not until after the decree was entered that the plaintiff ascertained that King had died some time in the fall of the year 1892; that on December 15, 1892, the defendant was appointed by the Probate Court for the County of Suffolk administratrix of his estate, and thereafter gave due notice of her appointment by publication, and on March 2, 1893, filed in the Probate Court an affidavit setting forth such notice; that the petitioner was informed and believed, and therefore averred, that the defendant, at the time of her appointment as administratrix as aforesaid, was cognizant of the proceedings in the Circuit Court for the Eastern District of Tennessee between the plaintiff in this suit as plaintiff and the said Stillman B. King and others as defendants; and that she had from that time forward, until the decree was entered in said suit in Tennessee, employed and continued to employ counsel to represent the interests of the estate of Stillman B. King in said litigation in Tennessee; that substantially all the estate left by King was situated in Massachusetts, which, according to the inventory filed on March 2, 1895, showed realty to the amount of $10,550, and personalty to the amount of $12,955.90; that no account had been filed in the Probate Court by the defendant; that King left no estate in Tennessee except the lots of land purchased of the Cardiff Coal and Iron Company, which had been sold under an order of court, and the proceeds applied in part payment of the notes; that the two years allowed by Pub. Sts. c. 136, § 9, for bringing suits against the defendant as administratrix expired before he had any notice or knowledge of the death of King; that the defendant, by omitting to suggest the death of King, although she was cognizant of said suit, was guilty of a fraudulent concealment of the same; that the plaintiff was not chargeable with culpable neglect in not prosecuting his claim by a suit in Massachusetts within the next two years, and justice and equity required that he should now have judgment for the amount of his claim against the estate of King; and that this proceeding had been begun and was prosecuted by the plaintiff, not only for general creditors, but for the benefit of persons who, upon the security

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of the notes mentioned in the bill, in good faith and before maturity thereof, advanced to the Cardiff Coal and Iron Company sums of money fully equal to the amount of the notes; and that after crediting all partial payments and proceeds of land sold, as stated in the bill, there still remained due to the pledgees or their representatives a sum equal to the amount sought to be collected from the defendant.

The prayer was that judgment might be rendered for the plaintiff for the amount of his said claim against the estate of King.

The defendant demurred to the bill, assigning as grounds therefor, want of equity, that the plaintiff had not stated a good and valid claim against the defendant, and that the cause of action was barred by the statute of limitations, and no sufficient cause was stated in the bill to take the case out of the statute. The Supreme Judicial Court sustained the demurrer; and the plaintiff appealed to the full court.

The case was argued at the bar in December, 1896, and afterwards was submitted on briefs to all the justices.

H. R. Bailey, (*J. H. Morison* with him,) for the plaintiff.

F. S. Hesseltine, for the defendant.

KNOWLTON, J. This bill is brought by the receiver of a Tennessee corporation. It fails to show whether the nature of the receivership is such as to give him a title to the notes and account on which his claim is founded, and to enable him to sue upon them in his own name. See *Amy* v. *Manning*, 149 Mass. 487; *Wilson* v. *Welch*, 157 Mass. 77; *Buswell* v. *Order of the Iron Hall*, 161 Mass. 224; *Fort Payne Coal & Iron Co.* v. *Webster*, 163 Mass. 134; *Booth* v. *Clark*, 17 How. 322; *Yeager* v. *Wallace*, 44 Penn. St. 294. From the statement that the notes and account were "among the assets which came into the hands and ownership of the plaintiff as such receiver," and the further statement that he prevailed at all stages of the suit in the United States Circuit Court, in the United States Circuit Court of Appeals, and in the Supreme Court of the United States, it may fairly be inferred that as receiver he became assignee of the assets. But the question in regard to his right to sue was not raised upon the demurrer, nor presented in argument. It is therefore unnecessary to consider it further.

Both parties contend that the judgment obtained in the

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United States Circuit Court in Tennessee was either voidable or void. If the judgment is treated as a nullity, the bill sets forth with sufficient fulness a claim upon the notes. The judgment is not set out particularly, and it does not appear whether or not it was merely an affirmation of a decision rendered before the decease of the defendant's intestate. See *Reid* v. *Holmes*, 127 Mass. 326, and cases cited. If it was entered under such circumstances and in such form as to be valid, or merely voidable and not void, there is a sufficient statement of it in the bill to enable the plaintiff to proceed, inasmuch as no objection is taken to the form of the allegation. In the present aspect of the case it is not important to determine whether it is void, or merely voidable, since the bill tells in general language the whole story of the plaintiff's claim, and asks for payment of it, without reference to the question whether it is legally represented by the notes and account, or by a judgment in which they are merged. Under Pub. Sts. c. 136, § 10, the remedy is in equity, as well on a claim under such a judgment as on a claim under the notes and account.

We come now to the question whether the plaintiff can have relief under Pub. Sts. c. 136, § 10, which is as follows: "If the Supreme Judicial Court upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding section, is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payment or distribution made before the filing of such bill." Upon the facts stated in the bill there is no doubt that the plaintiff would have been entitled to recover at common law if suit had been brought upon his claim within two years after the appointment of the defendant as administratrix. The suit is founded upon contracts which it was the legal duty of the defendant's intestate to perform. If the contracts were advantageous to the corporation which the plaintiff represents, it was entitled to the benefit of them, and nothing appears that makes them less enforceable in equity than at law. The simple question is whether the statute above quoted was

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intended to relieve a plaintiff who has lost his right to proceed at common law under such circumstances as appear in this case.

The statute has repeatedly been considered by this court. *Waltham Bank* v. *Wright*, 8 Allen, 121. *Jenney* v. *Wilcox*, 9 Allen, 245. *Bradford* v. *Forbes*, 9 Allen, 365. *Prentice* v. *Dehon*, 10 Allen, 353. *Wells* v. *Child*, 12 Allen, 333. *Richards* v. *Child*, 98 Mass. 284. *Ball* v. *Wyeth*, 99 Mass. 338. *Allen* v. *Ashley School Fund*, 102 Mass. 262. *Sykes* v. *Meacham*, 103 Mass. 285. *Spelman* v. *Talbot*, 123 Mass. 489. *Brooks* v. *Rayner*, 127 Mass. 268. *Morey* v. *American Loan & Trust Co.* 149 Mass. 253. *Knight* v. *Cunningham*, 160 Mass. 580. Without reviewing these cases, we are of opinion that there is no adjudication in any of them that would require a decision in favor of the defendant if applied to the facts of the present case. The statute is remedial, and it expressly provides that a judgment under it in favor of a plaintiff shall not affect any payment or distribution from the estate of the deceased person made before the filing of the bill. Its operation is not limited to cases where the failure to sue seasonably was due to such fraud, accident, or mistake as would be a ground for equitable relief if there were no statute. In each of the two cases last cited, relief was given under it when the circumstances were certainly not more favorable to the plaintiff than they are in the present case.

If the averments of the bill are true, the present plaintiff was not a creditor who waited quietly and carelessly for more than two years after the death of his debtor in another State when all the time he had no other plan or purpose for the recovery of his debt than to seek the debtor at his domicil. By the service of process upon the debtor he had brought him within the jurisdiction of the Federal Court in Tennessee, and was pursuing him there. The debtor had appeared in court by counsel, and had made an answer which he had sworn to in person. The plaintiff prevailed before the Circuit Court, the Circuit Court of Appeals, and finally before the Supreme Court of the United States. No suggestion had come from any source that the defence, which was all the time being conducted in the name of the defendant's intestate and others, was not in fact conducted by him as well as by his co-defendants. The defendant, at the time of her appointment as administratrix, was cognizant of the proceedings

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in court, and from that time until the entry of the judgment employed counsel to represent the interests of the estate of her intestate in the litigation. It seems clear that the plaintiff was not guilty of culpable neglect in assuming that his debtor was living so long as the defence was conducted and appeals were taken in his name. The proceedings which were being conducted with the defendant's knowledge and consent, apparently in behalf of the defendant's intestate, were almost equivalent to repeated assertions by the intestate or his legal representatives that he was still living. The plaintiff supposed that he was alive until after the decision of the Supreme Court of the United States, more than two years after the appointment of the defendant as administratrix.

In our opinion the statute was enacted to furnish a remedy in cases like this, and we discover no injustice to anybody in allowing the claim to be prosecuted as it would have been if the plaintiff had learned of the death of his debtor, and had brought suit against the administratrix within two years after her appointment. *Demurrer overruled.*

BUTCHERS' SLAUGHTERING AND MELTING ASSOCIATION *vs.* COMMONWEALTH.

Suffolk. March 2, 1897. — September 8, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Eminent Domain — Taking of Easement in Land — Metropolitan Sewerage Act — Evidence — Damages — Special Benefits — Instructions.

At the trial of a petition for the assessment of damages for the taking of an easement in land under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), if a witness, who is not a real estate expert and does not know the money value of the petitioner's land, has testified generally to the effect of the taking upon the development of the land and upon its value, it is not error to exclude a question to him as to what percentage of its value a certain strip is affected by the sewer, which strip is the land along the road through which the sewer is laid, and which he has stated will be impaired in value by the taking if it is not adapted to use for a public highway, upon which question of adaptability there is contradictory evidence.

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If, at the trial of a petition for the assessment of damages for the taking of an easement in land for the construction of a public sewer, the petitioner contends that the sewer will in a few years become inadequate for the drainage of the territory through which it passes, he shows no ground of exception to the statement of a witness, who has testified in accordance with such contention, that he cannot fix the time within which it will be necessary to make further provision for the drainage, and that it may be within twenty years; nor to the statement of the witness, who is a competent expert, that "both the location and elevation of the new supplementing sewer require it to be put in another place and make a second sewer necessary at a higher elevation and in another part . . . not in connection with this taking."

If an easement taken in land under the authority of the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), is "the right to carry and conduct, under the following described lands, and therein to construct, operate, and forever maintain an underground main sewer and connecting sewers, drains, manholes, and underground appurtenances, and to repair and renew the same," no right to remove the soil from one part of the system of sewers constructed under the statutes to another, in repairing and renewing the main sewer, is included in the taking.

At the trial of a petition for the assessment of damages for the taking of an easement in land under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), where it is contended only in behalf of the Commonwealth that it is bound by the sanctity of a moral obligation not to abandon the work in question, the petitioner is not entitled to have the jury instructed that the Commonwealth is under no contract or obligation to maintain the sewer through the petitioner's land.

If a sewer is constructed, under the authority of the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), through land in a place which has long been used as a way and is specially adapted to such use, and is located lengthwise through such land, thus rendering it easy and comparatively inexpensive for the owner to drain every part of his land, the jury, in assessing his damages, may find this to be a special and peculiar benefit which may be set off against the damages, although other lands receive similar benefits.

At the trial of a petition for the assessment of damages for the taking of an easement in land under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), it appeared that a large number of buildings had been erected upon the land designed to be used in killing and dressing animals intended for food, and in rendering into useful products the parts unsuitable for food in their natural state, and that, previously to the construction of the sewer, the drainage from these buildings was conducted into a river. There was evidence from which the jury might have found that the drainage was creating a nuisance; that it would have been impossible for the petitioner to continue using the property in this business if the sewer had not been built; and that the property was much more valuable for this use than for any other. *Held*, that instructions in regard to benefits in reference to this use, from which the jury must have understood that they were to consider benefits to the real estate in view of its adaptedness to the petitioner's business and not benefits to such business, were not open to exception.

PETITION for the assessment of damages for the taking of an easement in the petitioner's land in the Brighton district

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of Boston, under the Metropolitan Sewerage Acts, Sts. 1889, c. 439, and 1890, c. 270. After the former decision, reported 163 Mass. 386, the case was tried in the Superior Court, before *Sherman*, J., who allowed a bill of exceptions, in substance as follows.

The rights described in the takings were as follows: "The right to carry and conduct under the following described lands, and therein to construct, operate, and forever maintain an underground main sewer, and connecting sewers, drains, manholes, and underground appurtenances, and to repair and renew the same," the premises therein described being a strip of land 3,295 feet long, through the petitioner's premises in the Brighton district, from Western Avenue to North Beacon Street, containing 81,564 square feet of land, and particularly described by metes and bounds, and shown on plans recorded in the registry of deeds with the takings.

The first taking described a strip of the above length and twenty feet in width, and was filed on March 26, 1891; and the second described certain strips lying by the side of the twenty-foot strip, and was filed on November 7, 1891. These takings were treated as one at the trial.

The petitioner owned a tract of land containing forty-six acres, bounded on the north by the Charles River, on the east by Western Avenue, on the south by Market Street, Wexford Street, and the location of the Boston and Albany Railroad, and on the west by land of one Livermore and by North Beacon Street.

At the time of the trial, the State sewer had been completed through the premises and covered over, and the petitioner had built 1,685 feet of sewer upon its premises, parallel to the State sewer, and connected with it at three different points.

The petitioner called experts, who testified that the injury to the petitioner's land in which the easement was taken was fifteen cents a foot on the average, amounting to $12,225; and that the damage to its remaining land was from $40,000 to $50,000. The principal buildings were especially adapted to slaughtering and melting purposes. There was no evidence of physical injury to the buildings; but one expert testified that their value was depreciated ten per cent by the taking.

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The petitioner also contended, and introduced evidence to show, that the various wells on the premises were either dried up or reduced in depth by the building of the sewer; and that it had been forced to expend about $500, to extend the pipes connecting with the water supply of the city, which was already on a part of the premises, to get a supply to take the place of the water from the wells.

The petitioner also claimed damages for the annoyance to and interference with its business occasioned by the work of construction, which obliged it to discontinue the use of the way in which the sewer was constructed, and to use a different and less convenient road for driving in cattle and other purposes; but it was admitted that business went on during the construction without other interruption.

Webster F. Warren, called as a witness by the petitioner, testified that he was treasurer of the petitioner corporation, and had been such since 1873; that the petitioner's buildings, eleven or twelve in number, were mostly built in 1872 and 1873, the last building being completed in 1880; that the construction of the sewer was begun in April, 1891, on the North Beacon Street side, and in August, 1891, on the Western Avenue side; that the work continued until February or March of the following year; that from August, 1891, the work constantly occupied all of the passageway in the rear of the buildings on the river side, so that the petitioner was deprived of the use of it entirely for six or eight months; that much more than the twenty-foot strip was occupied; that the petitioner paid, under protest, an entrance fee of $1,400 to the city to enter the State sewer, saving any rights the petitioner might have to recover it back; that the expense of constructing the connecting sewer built by the petitioner was $2,455.42, not including the entrance fee above mentioned; that the petitioner continued to drain into the river for some time after the State sewer was completed, until they received a letter, dated October 31, 1892, from the secretary of the board of health, containing the following: "I am directed by the board of health to say that it will be obliged to insist that you proceed at once to discontinue the discharge of drainage from the abattoir into the river"; that it was in consequence of the action of the board of health that the petitioner

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stopped draining into the river; and that the business was not in fact stopped at any time.

Horace H. Moses, called as a witness by the petitioner, testified that he was a civil engineer, and had had long experience in cutting up tracts of land for various building and mercantile purposes for many years; and that he had been superintendent of sewers of the city of Boston for two years. After testifying generally to the effect of the taking by the State upon the development of the land and upon its value, he stated that it was an encumbrance upon the title of all the property covered by it, and if the strip taken was not adapted to any line of public highway it impaired the value of all the property traversed by it to the width of one hundred feet; that he had built sewers in all parts of the city, and had made for the city some unimportant takings; that he considered himself qualified to testify as an expert with regard to the effect of the building of a sewer upon a piece of land like the petitioner's; that he was not a real estate expert, and did not know the value in dollars and cents of the petitioner's land; and that he had had occasion to consider the effect of the location of sewers upon the value of tracts of land which he was developing. The witness was then asked by the petitioner the following question: "To what percentage of its value is this one hundred foot strip affected by that sewer?" Upon objection by the respondent, the judge ruled that the witness was not qualified to answer the question, and excluded it; and the petitioner excepted.

In the cross-examination of a witness for the petitioner, the counsel for the respondent, in reply to a statement by the petitioner's counsel that "You are stating an entirely incorrect proposition of law if you are stating that the Commonwealth is bound to keep a sewer there," made the following remark: "I think they have obligated themselves by the strongest sanctity of an act of the Legislature to keep this in; they are morally bound to keep it up and repair it."

The counsel's position upon this question was reiterated in his closing argument. Various experts called by the petitioner testified that the twenty-foot strip taken for the sewer was in a disadvantageous place for a permanent roadway and for the development of the property.

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William H. Whitney, called as a witness by the respondent, testified that he had been a civil engineer a little over thirty years; that he had had experience in improving lands, building streets, lotting up lands in Boston and vicinity, mostly in Back Bay lands; that he had been consulted as an expert in regard to such matters constantly; that he knew the petitioner's land in Brighton; that he had made an examination of that land, and had spent one afternoon there two years ago in looking it all over, — looked the deeds over, and consulted plans at that time and some since; that he had made accurate drawings of the land from data furnished by the deeds and other sources, and made a study of the method of development of this tract of land in case it should cease to be used for the present purpose, and studied its possibilities; that in his judgment the best point of entrance for a street upon that territory, and practically the only one, on account of the grade of the land, was at the end nearest to Boston, very close to the river, at the point where the existing roadway goes in, because the front was very narrow, and because of the grade of the other streets it would be impracticable to enter anywhere else in that part of the land; that, in his judgment, the best point of departure of a road upon North Beacon Street was substantially the same thing because of the marsh land; that he had plotted the sewer location in the existing road in the course of his studies; that the location of the sewer was an advantageous line for a road for the development of that property; that considering the property as adaptable for manufacturing purposes, or for development for other purposes, the effect generally of the taking for the sewer made by the Commonwealth was certainly an advantage; that the advantage was clearly seen in the fact that it furnished ample drainage for the land and removed the filth, the accumulation of the filth in the river, which was a great injury to it; that on that point alone it more than overbalanced any trifling waste of the land that might occur; that he certainly saw an advantage, on the whole, to this land; that he had always been interested in the existing drainage scheme of the city of Boston, which was discharged at Moon Island before this sewer was built, and had made a study of it; that as a member of the board of health of Cambridge he became greatly interested in it and its duplication

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on the north side of the river; that he had nothing to do with designing this system of sewerage or with the construction of it; that he did not think he could recall the sizes of the sewer through the abattoir property; that he did not know about what the size was nor how it was constructed; that he knew what the sizes were between the abattoir property and Moon Island; that where the west side intercepting sewer meets it at Gainsborough Street it had a capacity of seven feet in diameter virtually, and it increased somewhat in going towards Moon Island; that he had no personal knowledge of the size of the sewer above the abattoir property; that he did not know how the interior of that was constructed; that he had made a special study as to what ought to be done if it was necessary to supplement that sewer; that he had been called upon to make special investigation to determine what should be done in the way of increasing or supplementing this sewer, with reference to Cambridge, when he was a member of the board of health; and that that was after the lower part of the sewer was built, and after the sewer was opened for use for Boston proper, but before the sewer for its entire length was opened and before it was used by the "abattoir people." The witness was then asked by the respondent the following question: "Assuming that the sewer was constructed of the sizes shown on the plan before you and at the grades there shown from the point in Watertown to the connection with the city system at Huntington Avenue, for what length of time would it be adequate for the purpose for which it was designed?" The petitioner objected to this question upon two grounds; first, that the witness was not qualified as an expert upon the subject, and, secondly, that the question was not competent. The judge admitted the question, and the petitioner excepted. The witness answered: "I cannot fix it. Perhaps twenty years from this time it will have to be supplemented by something else, from my knowledge of the capacity of the sewer below Gainsborough Street." The witness was then asked by the respondent the following question: "Whether or not, in case that drainage scheme should become inadequate for the territory through which it goes, it would be reasonable or probable that this sewer should be enlarged in that portion which goes through the petitioner's property?" to which question the

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petitioner objected. The judge overruled the objection, and the witness answered: "Both the location and the elevation of the new supplementing sewer would require it to be put in another place, and make a second sewer necessary at a higher elevation and in another part of Brighton, not in connection with this taking"; and the petitioner excepted.

Sidney Smith, called as a witness for the respondent, testified that he was city engineer of Rutland, Vermont, and had been an engineer in charge of the construction of this sewer, and had occasion to go to the ground of the petitioner nearly every day, sometimes twice a day, and was familiar with the grades; that in his judgment the sewer would safely sustain a weight of three tons per square foot; that the necessity for repairs was very remote, — he should not expect it to be repaired inside of thirty or perhaps fifty years; that work was done at night by direction of the commission in order to facilitate matters; that the petitioner's business was slightly interrupted when the sewer was built through the entrance from Western Avenue, when the petitioner's teams had to come through a private way; that all the drains of the abattoir were so arranged as to slope towards the Charles River; that if they had located the sewer through the road on the south of the buildings it would have been necessary either to change their entire arrangement of drainage and plumbing, so as to discharge on the south side of the buildings, or else build a sewer in the road, where the State sewer is built now, and lead that to the south; that the work began in the petitioner's grounds about the 1st of July, and the entire work was not cleared up until April, but the sewer was in use and completed before that time; that he should say that there was not a very large amount of territory of the petitioner occupied during the progress of the work; that usually the work was confined to the roadway through which the sewer was built; and that, while the work was going on, there was very little outside the twenty-foot strip occupied during the whole time.

The petitioner requested the judge to give the following instructions, which the judge refused to do, except so far as they appear in the instructions given:

"1. Under the taking of the casement in the petitioner's land, which the Commonwealth made, it acquired the right, not only

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to construct, operate, and maintain an underground main sewer, and connecting sewers, drains, manholes, and underground appurtenances, and to repair and renew the same in any part of the strip described in the taking, but also the right at any time to alter and change the surface of the land within the said strip, to dig up the surface and to appropriate the soil and gravel so far as reasonably necessary to carry out the plan and construct the work contemplated by the statute, to remove the said soil and gravel to any other part of the said system of sewers constructed under the statute, and to keep the surface of said strip in any condition which might be reasonably necessary or convenient for the maintenance of an underground sewer, and also the right to exclude the petitioner from the strip described in the taking, to fence the same if it should be at any time reasonably necessary or convenient so to do for the purpose for which the easement was taken.

"2. The petitioner, at the time of this taking, in March, 1891, had no right to enter such sewer as the Commonwealth might construct in its land. Whether it would or would not acquire the right would depend upon what terms, conditions, and regulations the city of Boston might establish in reference to entering the sewer, and whether it could agree with the city in reference to the sum which the city might require for the permission to enter. Under these circumstances it cannot be found that the petitioner has sustained any peculiar or special benefit by reason of the location of the sewer through its land which can be set off against the damages caused by the taking.

"3. (In case No. 2 is refused.) If the petitioner's right or opportunity of entering the sewer is the same kind of right or opportunity, and none other, which other people in the neighborhood may have who have no land taken, such right or opportunity would not constitute a special or peculiar benefit which should be set off against the damages caused by the taking.

"4. Special and peculiar benefit is not to be found from the special use which the petitioner makes of its property, or the business which it carries on.

"5. The Commonwealth is under no contract or obligation to maintain that sewer through the petitioner's land.

"6. If the petitioner's drain into Charles River and the sewers

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of the territory of the Brighton district emptied into the same river, and by the adoption of this metropolitan drainage system the petitioner's sewage and that of Brighton district were turned into this sewer, the petitioner derived no special and peculiar benefit which can be set off against its damages.

"7. If the benefit to the petitioner from the sewer was in having entrance to a permanent system of sewage disposal at tide water, and if this benefit was also received by estates generally in Brighton and adjoining towns, then there is no special or peculiar benefit which can be set off against the petitioner's damages.

"8. As to the strip of land through which the sewer runs, or any lots which include any portion of said strip, the petitioner cannot legally make a conveyance free and clear of encumbrance, but must convey subject to the easement acquired by the Commonwealth, and this easement is a cloud upon the title to any such lots."

The judge instructed the jury, among other things, as follows:

"You ought to say that the Commonwealth will always act reasonably about it [the sewer], and that in making repairs or doing anything upon it they can do whatever is reasonable and proper in doing it, and that they will do nothing to molest or trouble the petitioners, except what is proper and reasonable, and that is the view you ought to take of the condition of the two parties. If there should be at any time a break in the sewer, they would have a right to go there and repair it; if necessary to stop people's going across the place where the repairs were in progress, to fence it up temporarily for that purpose, or to do anything which you would appreciate would be reasonable and proper in making those repairs. You ought also, in considering how the interruption will be liable to be, to consider what the sewer is and how it is constructed; its permanence or its lack of permanence; the material of which it is constructed, and the manner in which it is constructed. That all bears upon the question of liability to interruption or otherwise. . . .

"The respondent takes the ground that there was a peculiar and special benefit to the petitioner, not shared in by the general community, and in order to give you any aid on that subject I ought to state that so far as the community there have had the

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benefit of the sewer which they needed, so far as they have all had that benefit generally shared in by that community, no benefits by way of set-off can be set up or allowed, and it is only the peculiar and special benefits which the petitioner has received that can be considered. . . .

"The Commonwealth claims, this being a piece of land of forty-five acres, that that sewer has been so placed in it, and is so run through it, that it has given it a peculiar and special benefit, and that it is worth a great deal more to the petitioner than if it had been put to one side or run through one corner, or run off from the land, and therefore in that manner it has made the land more valuable, and is a peculiar and special benefit. On the other hand, the petitioner says that is all wrong, that it is not so at all, that it would have been a great deal better if it had gone outside of the entire land, and would not have damaged them half so much. Now, all I have to say is, if you find that the Commonwealth's contention is the true one, — that must be first settled, — and that by going through this land they have conferred a peculiar and special benefit upon the land, and therefore upon the petitioner, then you may consider it as a peculiar and special benefit; but first you must determine how you find on that question. If you take the petitioner's view of it, then there is no special and peculiar benefit. If you take the Commonwealth's view of it, then you may find a special and peculiar benefit.

"There is one other ground upon which the Commonwealth claims there should be a set-off by way of a benefit. It claims that this corporation had erected large and valuable works there for the purpose of slaughtering and melting, and that they needed great facilities for sewerage, and that there was every reason to believe that in the near future that would be cut off from them, they could not have them, they would have to stop their work, and they could not go on, and it claims that putting through this sewer there upon their land which it has appropriated for this work under this street, which they were actually using, gave to that business which they were conducting a peculiar and special benefit, and it holds that that is entitled to be considered a benefit. The petitioner says, on the other hand, that is all a fallacy; that there is nothing in it; that they had all

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the accommodations they wanted before, and as to this talk about the Legislature complaining and people complaining about a nuisance, they had plenty of conveniences for sewerage purposes by going through different sewers into the Charles River, and they had a right to anticipate that, whenever that would be stopped, the city of Boston would furnish them other sewerage. The respondent says, 'You required this; you could not carry on your business until you had this accommodation with sewers, and at just the right time the Commonwealth came on and put in a sewer, not only to accommodate you to-day, but to accommodate you for all time with this business, and to get rid of the nuisance which you were creating.' Now, if you take the petitioner's view, and find that it has the correct view of it, then there are no special and peculiar benefits to the petitioner. If, on the other hand, you take the Commonwealth's view, and find that by the manner of constructing this sewer through the petitioner's ground, that was a special and peculiar benefit to their business where it was constructed, in the manner and way it was constructed, which helped them to get rid of sewage, and thereby became a special benefit to them, then you may consider it as within that class."

The following questions were submitted to the jury:

"1. Was the location of the sewer through the petitioner's land a special and peculiar benefit to it by reason of the way and direction in which it ran through its land from one end of its length to the other?

"2. Was the location of the sewer through the petitioner's land a special and peculiar benefit to it beyond that generally enjoyed by others, by reason of the fact of the peculiar business to which its buildings were adapted?"

The jury answered these questions in the affirmative, and returned a verdict for the petitioner in the sum of one dollar; and the petitioner alleged exceptions.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

R. M. Morse & E. A. Whitman, for the petitioner.

W. D. Turner, for the Commonwealth.

KNOWLTON, J. The first question is whether Moses, a civil engineer called by the petitioner, should have been permitted to

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answer the question, "To what percentage of its value is this hundred-foot strip affected by that sewer?" The witness had testified that he was not a real estate expert, and did not know the value in dollars and cents of the petitioner's land. He had testified generally to the effect of the taking upon the development of the land and upon its value. The hundred-foot strip referred to in the question was the land along the road through which the sewer was laid, which the witness said would be impaired in value by the taking, if the strip taken was not adapted to use for a public highway. There was contradictory evidence as to the question whether it was adapted to such a use. Without determining whether the judge might properly, in the exercise of his discretion, have permitted the question to be answered, we think it clear that there was no error of law in excluding the evidence. The evidence related only to a part of the land, and the effect of the taking upon that part would be entirely different if the line of the sewer was adapted to use as a street from the effect if it was not. The question did not direct the attention of the witness to the hypothesis upon which his answer was to be founded, and so far as appears the witness had no opinion in regard to the question which hypothesis was true. In several particulars the case is different from *Whitman* v. *Boston & Maine Railroad*, 7 Allen, 313, 328, in which the witness was familiar with the lands in the vicinity, and had had personal experience for a long time in the use of the easement which was destroyed by the taking.

The first of the answers of the witness Whitney, to which exception was taken, did the petitioner no harm. The questions were directed to the contention of the petitioner in argument, that the sewer just constructed would, in a few years, become inadequate for the drainage of the territory through which it passes, and that it would then become necessary to take it up and build a larger one. His first answer was in accordance with the first part of the petitioner's contention, with a statement that he could not fix the time within which it would be necessary to make further provision for the drainage, and that it might be within twenty years. Certainly the petitioner could not complain of this answer.

His answer to the second question was not objectionable. The

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evidence tends to show that he had given a great deal of study to the subject which he was then considering, and that he was a competent expert. His answer, that "both the location and the elevation of the new supplementing sewer require it to be put in another place, and make a second sewer necessary at a higher elevation and in another part of Brighton, not in connection with this taking," was important for the consideration of the jury. The fact, if it was a fact, and if it was not admitted, was a proper subject for proof, and it was a matter in which the study and experience of the witness would greatly aid him in forming a valuable opinion. We think that this evidence was rightly admitted.

The instructions given in regard to the matters referred to in the petitioner's requests were correct and sufficient. The petitioner contends that the jury should have been told that the Commonwealth may at any time hereafter remove the soil, sand, and gravel to another part of the system of sewers constructed under the statute, and in support of this contention it cites *Titus* v. *Boston*, 149 Mass. 164. The facts on which that case was decided are very different from those in the case at bar. The city of Boston had been authorized to build and maintain wharves, pumping works, and reservoirs for a sewer on the main land at or near the mouth of Neponset River, and also to build and maintain a reservoir or reservoirs at Moon Island, and other works essential to a proper and convenient discharge of the contents of the sewer, which was to be a main sewer carrying the drainage of the city of Boston. It had the right to take such lands, buildings, wharves, and structures as might be necessary to accomplish the objects of St. 1876, c. 136, §§ 1, 2. It took the whole of Moon Island, the area of which is about thirty-five acres. It was held that this taking for purposes of construction gave the city the right to carry the loam and gravel excavated in making the reservoirs to the main land, to be used in construction there. Such a use of the property seems fairly to have been contemplated by the statute and the taking under it.

In the present case the statute authorized the taking of "any lands, watercourses, rights of way, or easements" necessary to carry out the provisions of the act. St. 1890, c. 270. The ease-

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ment taken in the lands of the petitioner was merely "the right to carry and conduct, under the following described lands, and therein to construct, operate, and forever maintain an underground main sewer, and connecting sewers, drains, manholes, and underground appurtenances, and to repair and renew the same." The rights of the Commonwealth are limited to the easement taken. It is not reasonably necessary for the maintenance of the main sewer to remove the soil from one part of the system to another in repairing and renewing the sewer, and no right so to do is included in the taking. In this particular the work to be done is so unlike the work of repairing, maintaining, and reconstructing highways, that there is but little analogy between them. The request had reference only to the rights of the Commonwealth to use the land in repairing and renewing the sewer, and we are of opinion that there was no error in this part of the charge.

The exceptions do not show such facts as made it the duty of the judge to give the fifth instruction requested by the petitioner. The respondent did not contend that the Commonwealth was under a contract to maintain this sewer through the petitioner's land. All that the respondent's counsel contended was that the Commonwealth was bound, by the sanctity of a moral obligation, not to abandon this great work which it has constructed at an enormous cost, that must be paid by the people residing in the neighborhood. We think that the argument was legitimate.

The only remaining exceptions relate to the instructions and the refusals to instruct in regard to the set-off of benefits to the land of the petitioner. It is contended that there were no such benefits that could be set off; but it appears that the sewer was constructed through the petitioner's land in a place which has long been used as a way, and which many witnesses testified was specially adapted to use as a public highway. The petitioner might acquire a right to enter the sewer with its private drains, upon such terms, conditions, and regulations as the proper public authorities might establish. In fact, it has so entered the sewer. St. 1889, c. 439, § 9. The location of the sewer lengthwise through the tract of land has reduced to a minimum the length of the particular drains necessary to connect different

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lots with the sewer, and has made it easy and comparatively inexpensive for the petitioner to drain every part of its land. The jury might find this to be a special and peculiar benefit, which might be set off against the damages, even though other lands received similar benefits. *Allen* v. *Charlestown*, 109 Mass. 243. *Hilbourne* v. *Suffolk*, 120 Mass. 393. *Donovan* v. *Springfield*, 125 Mass. 371. The general doctrines applicable to this part of the case were correctly stated and sufficiently explained to the jury.

There was evidence from which the jury might have found a special and peculiar benefit to the property, growing out of a special use to which it was adapted. A large number of buildings have been erected upon it, designed to be used in killing and dressing animals intended for food, and in rendering into useful products the parts unsuitable for food in their natural state. Previously to the construction of the sewer the drainage from these buildings was conducted into the river. There was evidence from which the jury might have found that this drainage was creating a nuisance, and that it would have been impossible for the petitioner to continue using the property in this business if the sewer had not been built. The jury might also have found that the real estate, including the erections upon it, was much more valuable for this use than for any other. The petitioner contends that the jury were erroneously instructed in regard to benefits in reference to this use. If the jury had been permitted to set off benefits to the business of the petitioner, as distinguished from benefits to the real estate in view of its adaptedness to this business, it would have been erroneous. There are expressions in the charge which, taken by themselves, might indicate that benefit to the petitioner's business was to be considered; but when we consider all that was said upon the subject, we are of opinion that the jury must have understood that they were to consider the business only so far as the value of the real estate and the benefits received by it were affected by its adaptedness to be used in that business. A question which the jury were instructed to answer was in these words: "Was the location of the sewer through the petitioner's land a subject of peculiar benefit to it, beyond that generally enjoyed by others, by reason of the fact of the peculiar business to

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which its buildings were adapted?" This called attention to the real estate, and not to the business in which the petitioner happened at that time to be engaged. See *Maynard* v. *Northampton*, 157 Mass. 218, 219, and cases cited. The whole charge is to be considered, so far as it relates to this subject, and the language must be understood as correctly presenting the question whether, by reason of the large and valuable works erected upon the land, it was adapted to a particular use for which its value was specially increased after the construction of the sewer, on account of the additional facilities for drainage afforded by the sewer.

In the opinion of a majority of the court, the entry should be *Exceptions overruled.*

JOHN O. SHAW, JR., trustee, *vs.* JOSEPH S. ECKLEY & others.

Suffolk. March 17, 1897. — September 8, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Will and Codicil — Trust — Vested Interest in Contingent Remainder — "Survivorship" — Words of a Will sufficient to pass Direct Legacies or Contingent Remainders.

A testator provided by will that all property coming thereunder to his sons D. and J. should be held in trust, the share of each son to be a distinct trust, "and the net income of each of my said son's shares shall be paid over to them respectively at convenient periods during their respective lives; and on the decease of my said son D. the principal sum held in trust for him shall be paid to his son D., if then living, and in case of his previous decease the trustees shall pay over said principal sum to my daughter and to my other sons, to be equally divided among them, the issue of a deceased child, other than the issue, if any, of my said son D., taking their parent's share by right of representation; and on the decease of my said son J. the principal sum held in trust for him shall be paid to his issue, if any then living, and otherwise, then to my heirs at law then living." The grandson D. Junior died in the lifetime of his father. *Held*, that the interest of the children in the remainder after the death of D. vested immediately on the death of the testator, and that the fund was to be divided into five equal shares, one for each of the children of the testator other than D. and for the representatives of the deceased children.

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A testator provided by will "upon the decease of my said daughter, to finally dispose of, transfer, pay over, and convey the said trust fund, that is to say, the said real estate on B. Street, or the proceeds of the sale thereof, . . . and in case one or more of her said brothers shall die before her decease, then upon her decease to dispose of and convey the same to her surviving brothers in equal shares respectively, if more than one shall survive her, to their use and the use of their heirs and assigns forever; and if only one shall survive her, then to him, to his use and the use of his heirs and assigns forever; but in case one or more of her brothers dying before her decease shall leave issue which shall be living at the time of her decease, then upon her decease the such issue, if any, shall take the share or shares of its deceased father or fathers, respectively." At the time of her decease four of her brothers were living, and one had died leaving a daughter who was then living, but since deceased, having conveyed her interest to trustees under a marriage settlement. *Held*, that the four brothers and the daughter of the deceased brother were entitled each to one fifth of the proceeds of the fund at the time of her decease, the share of the deceased brother's daughter passing to the trustees under the marriage settlement.

The words of a codicil, "all the property coming under my said will from my estate to my sons D. and J. shall be held in trust," etc., were declared by the court to be broad enough to cover anything that might come to them from contingent cross-remainders by another part of this clause of the codicil, and also anything that might come to them directly or from contingent remainders under other clauses of the will, there being nothing contradictory to this in any part of the will or codicil.

BILL IN EQUITY, filed December 9, 1896, by the trustee under the will of Caroline S. Eckley, to obtain the instructions of the court as to the construction of the will. Hearing before *Barker*, J., who reserved the case for the determination of the full court, upon the petition and answers. The facts appear in the opinion.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

C. C. Read, for the plaintiff.

F. Brewster, for Joseph S., Henry, and John L. Eckley, sons of Caroline S. Eckley, now living.

F. L. Hayes, for S. Gannett Wells, trustee under the will of Frances A. Eckley.

J. H. Young, for Robert E. Leman and James B. Miller, trustees under the marriage settlement of Blanche T. Eckley.

KNOWLTON, J. This bill for instructions relates to two funds, each of which is derived from the estate of Caroline S. Eckley, deceased. The first is the share of her son David, referred to in the fifth clause of the second codicil of her will, which is as follows: "It is my will that all the property coming under my

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said will from my estate to my sons David Eckley and John Lowell Eckley shall be held in trust by the trustees hereinafter appointed, or by whomsoever shall act in their place, and that the share of each son shall be managed separately, as a distinct trust; and the net income of each of my said son's shares shall be paid over to them respectively at convenient periods during their respective lives; and on the decease of my said son David the principal sum held in trust for him shall be paid to his son David, if then living, and in case of his previous decease the trustees shall pay over said principal sum to my daughter and to my other sons, to be equally divided among them, the issue of a deceased child, other than the issue, if any, of my said son David, taking their parent's share by right of representation; and on the decease of my said son John the principal sum held in trust for him shall be paid to his issue, if any then living, and otherwise, then to my heirs at law then living." Her grandson, David Eckley, Jr., died in the lifetime of his father, and the question is whether the interests in the remainder after the life estate in this share vested on the decease of her son David, or at an earlier time. The question is not free from difficulty, but we are of opinion that these interests of her other children in the remainder, after the death of her son David, vested immediately on the death of the testatrix. The gift over in the contingency that happened is to her daughter and to her other sons. She had but one daughter, and the gift to her is as if her name had been mentioned. The gift is not made dependent on her surviving the life tenant. There is no language indicating that the daughter was not to have her share in this fund to dispose of as she chose if the life tenant survived his son David. The same argument applies to the shares of the sons of the testatrix. The words "other sons" mean sons other than David, the life tenant, and the language is the same in effect as if the daughter and the other sons were mentioned by name. The remainder after the death of David was to his son David, subject to the contingency of his surviving the life tenant. The remainder to the daughter and the other sons of the testatrix was contingent upon the decease of David, Jr., in the lifetime of his father. The remainder could not vest in possession until the death of the life tenant, but there may be a vested interest in a contingent

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remainder. The daughter and the other sons of the testatrix had such a vested interest from the death of the testatrix, although it was uncertain whether it would ever be vested in them in possession. "Such an interest is devisable, transmissible, and assignable, subject of course to the contingency upon the happening of which its value depends." *Cummings* v. *Stearns*, 161 Mass. 506, and cases cited.

The words, "the issue of a deceased child, other than the issue, if any, of my said son David, taking their parent's share by right of representation," were intended to provide that the interest of a son or daughter should determine or be devested in favor of issue in case of his or her decease leaving issue before the remainder vested in possession. Such a provision is not unusual, and is given effect according to the intention of the testator. *Blanchard* v. *Blanchard*, 1 Allen, 223, and cases cited. *Darling* v. *Blanchard*, 109 Mass. 176. *Putnam* v. *Story*, 132 Mass. 205. *Smither* v. *Willock*, 9 Ves. 233. This seems a more natural construction of the language than to hold that the gift to the daughter, which in terms was absolute, was to take effect only in case she survived her brother David, and that the gifts to the sons other than David were only to such of them as should survive him.

There seems to be no good reason for fixing the date of the death of David Junior as the time at which to determine the persons who shall take. That is not the date at which the remainder would either vest in interest or vest in possession. The only change which occurred at that time was that the remainder, which before was contingent, became absolute in the daughter and other sons of the testatrix, subject only to be devested in the case of any of them who should die leaving issue before it vested in possession. For cases tending to support this view, see *Gardiner* v. *Guild*, 106 Mass. 25; *Hill* v. *Bacon*, 106 Mass. 578; *Whall* v. *Converse*, 146 Mass. 345; *Marsh* v. *Hoyt*, 161 Mass. 459; *Cummings* v. *Stearns*, 161 Mass. 506. We are therefore of opinion that this fund is to be divided into five equal shares, one for each of the children of the testatrix other than David, and for the representatives of the deceased children.

The other fund comes from the sale of the Beacon Street real

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estate after the death of Frances A. Eckley, the daughter of the testatrix. The language of the fourth clause of the will, under which the sale was made, is in part as follows: "Upon the decease of my said daughter, to finally dispose of, transfer, pay over, and convey the said trust fund, that is to say, the said real estate on Beacon Street, or the proceeds of the sale thereof, . . . and in case one or more of her said brothers shall die before her decease, then upon her decease to dispose of and convey the same to her surviving brothers in equal shares respectively, if more than one shall survive her, to their use and the use of their heirs and assigns forever; and if only one shall survive her, then to him, to his use and the use of his heirs and assigns forever; but in case one or more of her brothers dying before her decease shall leave issue which shall be living at the time of her decease, then upon her decease the such issue, if any, shall take the share or shares of its deceased father or fathers respectively." At the time of her decease four of her brothers were living, and one, Arthur A. Eckley, had died, leaving a daughter who was then living but who has since deceased, having conveyed her interest to trustees under a marriage settlement. There can be no doubt that these four brothers and the daughter of her deceased brother were entitled each to one fifth of the proceeds of the fund at the time of her decease. The share of her deceased brother's daughter passed to the trustees under the marriage settlement.

The only remaining question is whether the share to which John Lowell Eckley is entitled from the trust fund held for the benefit of his brother David, and in the proceeds of the sale of the Beacon Street property, and the share which David took in the same proceeds, come under the trust created by the fifth clause of the second codicil of the will. The words used are, "all the property coming under my said will from my estate to my sons David Eckley and John Lowell Eckley shall be held in trust," etc. This language is broad enough to cover anything that might come to them from the contingent cross-remainders created by this clause, and also the contingent remainders under the other clauses of the will. There is nothing contradictory to this in any part of the will or codicils, and we are of opinion that the provision is applicable to everything that comes to

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either of these two legatees under the will, either directly or as a contingent remainder, after the death of other beneficiaries. Their shares of these funds are therefore to be paid to the trustees. Frances A. Eckley, a daughter of the testatrix, having died after the testatrix and before David Eckley, her share in the remainder after the life estate of David Eckley, under the fifth clause of the second codicil, is to be paid under her will to S. Gannett Wells, trustee. *So ordered.*

JACOB M. HASKELL, trustee, & others, *vs.* JOHN P. HILL & others.

Suffolk. December 4, 1896. — September 9, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Assignment in Trust for Benefit of Creditors — Construction of Assent — "Security" — Executor and Trustee.

A. made an assignment of his property in trust for the benefit of his creditors, which provided for their assent thereto. The executors of the will of A.'s father had, as authorized by the will, lent money of the estate to A., and held, as evidence of the loans, two promissory notes, one being the personal note of A. and the other the note of a firm composed of A. and B. and indorsed by A. before delivery; and the executors assented to the assignment as follows: "We signify our assent to the terms of said assignment as creditors of said A., expressly reserving all rights and remedies against any and all persons liable on our claim as maker, indorser, guarantor, or otherwise." *Held*, that the assent of the executors was to be construed as showing their intention to release A., but to reserve their rights against B. and to any security which they had.

A. made an assignment of his property in trust for the benefit of his creditors, which provided that, if any creditor held security which under the insolvency law would be applicable to his claim, he should be entitled to a dividend on only so much as might remain after deducting from it the proceeds received from a sale of the security. By the will of A.'s father, he became entitled on its final distribution to one third of the estate, which was held in trust under the will; and the estate was inventoried at more than $20,000. The will authorized the executor to loan to A. a sum not exceeding an amount named, "such sum so loaned . . . with interest thereon not paid upon the final distribution of my estate, to be deducted from his share thereof"; and nominated the executor as trustee also, and authorized the trustee to continue the loans. The executor, who had not been appointed trustee by the Probate Court, lent certain sums to A., with the knowledge and consent of all parties interested in the estate, and took promissory notes of A. therefor. *Held*, that the lien which the executor, by such loans, acquired on A.'s interest in his father's estate was "security"

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on the estate of A. within the meaning of the insolvency law; and that whether the executor acted as such in matters pertaining to the loans, or as trustee, was immaterial.

BILL IN EQUITY, filed in the Superior Court on August 28, 1895, by Jacob M. Haskell, trustee for the benefit of certain creditors of John P. Hill, and said Haskell, Charles H. Adams, and Albert C. Manson, copartners under the firm name of Haskell, Adams, and Company, against John P. Hill, Hannah C. Hill, and Mary J. Morgan, individually and as executors of the will of S. Prentiss Hill, to obtain instructions as to whether the plaintiff trustee should recognize the defendants or any of them, individually or as such executors, as creditors, and if so, to what amount, and whether he should pay them a dividend.

The following facts, among others, were agreed. On August 6, 1894, the defendant John P. Hill made an assignment under seal of all his property to the plaintiff Haskell, in trust to convert the same into cash and apply the proceeds to the payment of his debts. The instrument provided for the assent of creditors thereto; that any creditors who held any notes, debts, or accounts against the debtor, "which are guaranteed or indorsed by any other party or parties, or for which any other party or parties are liable as sureties, guarantors, or otherwise, do hereby expressly reserve all rights and remedies against such sureties, guarantors, indorsers, and persons so liable"; and that no creditor "holding security shall or does hereby release or impair or in any manner affect his right to such security; but if the security is applicable under the insolvency laws of said Commonwealth to the payment of the claim or debt by it secured, the creditor or creditors who are or shall become parties to this agreement, holding such security, shall receive and be entitled to dividends on only so much of the claim or debt as remains after deducting from it the amount received from a sale of such security."

The property assigned to the trustee consisted of merchandise in a store in Boston, and the fixtures and horses and wagons used in connection therewith, and the accounts receivable of the business, all of which the trustee has converted into cash, and the gross proceeds of which amount to about $3,100, and also whatever interest, if any, John P. Hill had in the estate of S. Prentiss

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Hill, deceased. The defendants are the executors of the will of S. Prentiss Hill, which was duly probated on May 4, 1888, and which provided that, after the payment of certain legacies, the residue of the estate was to be held in trust for the purposes set forth therein, and upon the termination of the trust the balance of the estate was to be divided equally among the three children of the testator, one of whom was John P. Hill; and further provided as follows: "I authorize my executors to loan to each of such partners," of whom John P. Hill was one, "such sums, not exceeding four thousand dollars to each, as may in the opinion of such executors be necessary to continue said business, such sum so loaned to said John P. Hill, with interest thereon not paid upon the final distribution of my estate, to be deducted from his share thereof; . . . and in case said trustees deem it expedient to continue said loans from said trust estate, they may do so upon such terms and conditions as they deem proper"; and appointed Hannah C. Hill, Mary J. Morgan, and John P. Hill executors and trustees.

The assets of the estate, according to the inventory filed by the executors, aggregated $20,583.32, and there were no debts.

The defendants, as executors of the will of S. Prentiss Hill, loaned to John P. Hill in his individual capacity the amounts and at the time stated in two promissory notes, each dated September 16, 1890, and payable on demand to the defendants as executors, the first for $473.80, and signed by John P. Hill, and the second for $9,077.72, signed by "S. Prentiss Hill & Co." (then composed of John P. Hill and one Crown), and indorsed as follows: "Waiving demand and notice, John P. Hill." This indorsement was signed on the back of the note before its delivery to the executors.

The interest on the loans was regularly paid to the executors by John P. Hill to June 1, 1894. No part of the principal of the loans had been paid at the date af the assignment.

John P. Hill, one of the executors of the will of S. Prentiss Hill, John P. Hill of the firm of S. Prentiss Hill and Company, and John P. Hill whose individual name appears on the notes, are one and the same person.

Within sixty days from the date of the assignment, the defendants, as such executors, filed with Haskell copies of the

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notes and their assent to the assignment in the following form, and in no other way have they assented or become parties to the assignment: "Whereas John P. Hill of Boston, Mass., on the sixth day of August, A. D. 1894, made an assignment to Jacob M. Haskell of Boston, Mass., for the benefit of the creditors of said Hill, — Now therefore we the undersigned signify our assent to the terms of said assignment as creditors of said Hill, expressly reserving all rights and remedies against any and all persons liable on our claim as maker, indorser, guarantor, or otherwise. Our said claims consist of two promissory notes, copies of which are hereto annexed."

The Superior Court entered a decree, providing as follows: "The assent to the assignment reserves to the executors the right to deduct the indebtedness owing them from defendant John P. Hill from the assets that may come to said Hill under the will of S. Prentiss Hill, and is not such an assent as should have been made by them to the assignment in order to entitle them to share in the assets in the hands of the plaintiff trustee. The plaintiff trustee is instructed not to recognize the defendants as creditors in the distribution of the trust fund."

The defendants appealed to this court.

G. F. Piper, for the defendants.

G. C. Abbott, for the plaintiffs, submitted the case on a brief.

MORTON, J. The first question relates to the construction of the written assent given by the executors to the assignment. Taken literally, the assent would seem to be of no effect. It signifies the agreement of the executors to the assignment, and yet reserves all their rights and remedies against any person liable as maker, indorser, guarantor, or otherwise, on the notes which they hold. These things would appear to be inconsistent with each other. That the executors intended their assent to be effectual, however, would seem to be evident from the fact that they assented at all. They were not required to assent unless they intended to agree to the assignment. Nothing appears from the assignment itself, or from the facts in the case, to show that it was improper for them to assent to it, or that they had no right to assent. And we think that the more natural construction of the writing is that the executors intended to release Hill, but meant to reserve their rights against Crown,

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who was liable as a member of the firm of S. Prentiss Hill and Company on the larger note, and to any security which they had, and that for that purpose they adopted in a slightly modified form, and not with entire accuracy, language found in the assignment.

The assent being sufficient, the remaining question is what amount, if any, the executors are entitled to prove against the estate in the hands of the assignees. The assignment provides in substance, amongst other things, that, if any creditor holds security, which under the insolvency laws of this Commonwealth would be applicable to his claim, he shall be entitled to a dividend on only so much as may remain after deducting from it the proceeds received from a sale of the security. By the will of S. Prentiss Hill, the father of the defendant Hill, the latter became entitled on its final distribution to one third of the estate disposed of by the will. The agreed facts find that the estate was inventoried at upwards of $20,000. It safely may be assumed, therefore, that the interest of the defendant Hill in the estate was worth several thousand dollars. By the will the executors were authorized "to loan" to the defendant Hill "not exceeding four thousand dollars, . . . such sum so loaned to said John P. Hill, with interest thereon not paid upon the final distribution of my estate, to be deducted from his share thereof." The sums represented by the notes which the executors hold against the defendant Hill were a part of the estate, and were lent to him by the executors with the knowledge and consent of all parties interested in the estate, and presumably with the understanding on the part of the defendant Hill that the will gave the executors the right to deduct the sums thus lent from his share of the estate on its final distribution, and that they were to exercise this right. We think that the lien which the executors thus acquired on his interest in the estate of S. Prentiss Hill is security on the estate of the debtor, within the meaning of the insolvency laws of this Commonwealth. It is, in effect, a right on their part to set off against his share, on the final distribution of the estate, the amount due from him to it on account of money lent by them to him, and though he could not set off against the notes the share which ultimately might be coming to him if suit were brought against him on them before

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the estate was ready for distribution, we think that that fact cannot prevent the lien which the executors have on his share of the estate from being regarded as security for the payment of the notes. The value of his interest can be determined by a sale of it, or in such manner as the parties agree, or otherwise if they are unable to agree.

The will was probated in 1888. The same persons are named in it as executors and trustees. So far as appears, the executors have not rendered their final account, nor been appointed trustees by the Probate Court. By the will the trustees are authorized to continue the loans. Whether the executors act as such in regard to matters pertaining to the loans, or as trustees, would seem to be immaterial. In default of any appointment of trustees by the Probate Court it devolves upon the executors to carry out the trusts created by the will. *Jones* v. *Atchison, Topeka, & Santa Fé Railroad*, 150 Mass. 304. *Smith* v. *Fellows*, 131 Mass. 20.

We think, therefore, that the decree of the Superior Court should be modified so as to permit the executors, if they desire, to prove the balance, if any, which will remain due on the notes after deducting therefrom what may be realized from the security which they have. *So ordered.*

PEOPLE'S NATIONAL BANK *vs.* FREEMAN'S NATIONAL BANK.

Suffolk. March 29, 1897. — September 9, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Draft — "Delivery" — Action.

If a sight draft, attached to a sealed package addressed to the drawee of the draft, is sent by mail to a bank for collection with the instruction, "Papers to be delivered only on payment of draft," and the cashier of the bank hands the draft and package to the drawee, at his request, to allow him to open the package and examine its contents, after which he returns the draft and package to the cashier and declines to pay the draft, there is no delivery of the papers, within the meaning of the prohibition in the instruction.

TORT, or contract. Trial in the Superior Court, without a jury, before *Lilley*, J., who, at the request of the parties, re-

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ported the case for the determination of this court. The facts appear in the opinion.

M. F. Dickinson, Jr. & H. R. Bailey, for the plaintiff.

H. M. Rogers, for the defendant.

BARKER, J. The defendant received by mail from the plaintiff for collection a sight draft pinned to a sealed package addressed to the drawee of the draft, who was a broker. The draft and package were sent in a letter, the contents of which, so far as material, were that the draft was for collection without protest, and "Papers to be delivered only upon payment of draft." The defendant had no knowledge of the contents of the sealed package, save such as could be inferred from the letter and from the appearance of the package, which was a large blue linen lined envelope, bearing the drawee's name and address in manuscript, and no more.

The drawee came to the defendant's banking-house in response to a notice, and at his request the cashier there handed to him the sealed package with the draft attached, and allowed him to open the package and examine its contents, after which the drawee handed back to the cashier the draft and package, and declined to pay the draft.

The package contained a report upon certain mines, which report the drawer of the draft, a mining expert, had made to the drawee, who wished to use the report in selling the mines, and who had employed the drawer to examine the mines, and to make a report thereon for a compensation, of which a part had been paid in advance, and the rest, payable on the delivery of the report, was represented by the draft. The report was long, and concluded with a summary to the effect that the mines were worthless.

Upon the refusal of the drawee to pay the draft, the defendant returned the draft and package to the plaintiff, with a letter stating that the draft was unpaid, and adding, "Denham claims the contract has not been fulfilled." Denham was the drawee. The plaintiff declined to receive the draft and package, returned them to the defendant, and brought this suit.

One count alleges the conversion by the defendant to its own use of the mining report. The other count alleges that the plaintiff employed the defendant to collect the draft and to

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keep and handle the sealed package and to deliver it to the drawee only on payment of the draft, and that the defendant negligently and in violation of its instructions delivered the sealed package without payment of the draft, by reason of which the drawee became acquainted with the contents of the mining report; that the defendant destroyed the money value of the draft and of the report, and that but for such negligence the defendant could have collected the draft in full.

The case was tried without a jury, with a finding that the defendant had violated the instructions under which the draft and package were sent to it by the plaintiff, and that the plaintiff was entitled to recover damages in the sum of one dollar, and no more. At the request of the parties the case was reported for our determination upon all the points of law involved, with the agreement that if, upon the case presented and the findings made, the plaintiff is entitled to recover, and in any aspect of the case is not limited to nominal damages, judgment shall be entered for the plaintiff in the sum of $1,000, without interest or costs, and that, if the plaintiff is not entitled to recover, judgment shall be for the defendant without costs; and with the further agreement that, if the evidence of usage, and of the conversation between the cashier and the drawee when the draft and package were handed to the drawee and handed back by him to the cashier, which evidence was excluded against the defendant's objection, should have been admitted, that it is to have the effect to which, if believed, it would be entitled; and also that, if the defendant's objections to the admission of evidence tending to prove that the transactions between the drawer and drawee out of which the draft and mining report arose were sound, this court is to give effect to such objections, and to render judgment accordingly. The evidence of usage was that there is a well known and well established usage among the collecting national banks in Boston to allow parties to whom are addressed packages to which drafts are attached, with instructions identical with those in the present instance, to inspect the contents of such packages before the acceptance or payment of the drafts drawn on them.

The conversation excluded was, in substance, that when the draft and envelope were first shown by the cashier to the

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drawee, the latter said that he was entitled to receive certain papers from the drawer, and was ready to pay the draft on receiving them; that when the drawee handed the package back, he said that the envelope did not contain the papers promised him, and was not according to contract; that he declined to pay the draft; and further, that he would examine some papers at his own office, and asked to have the draft presented again the following day, when it was in fact again presented and payment again refused. The evidence admitted against the defendant's objection was admitted on the question of damages, and consisted of certain portions of the drawer's deposition tending to prove the contract between himself and the drawee, its performance on his own part, and his own instructions to the plaintiff when he placed with the plaintiff the draft and package.

Although the draft and package were not at once returned to the plaintiff when the draft was not paid upon its first presentation, but were held one day by the defendant, and the draft was then again presented to the drawee in accordance with his request, while the letter of instructions contained the statement, "These collections are not to be held for any reason whatever, — return at once if not paid on presentation," — this breach of instructions does not appear to have been relied upon at the trial, and is not alluded to in the briefs, and we treat it as immaterial upon the questions raised by the report.

Nor do we consider the question of usage, or the other question of evidence. Assuming that the drawer had performed his contract, and was entitled to receive from the drawee the amount of the draft upon the delivery to the drawee of the mining report, when the drawee came to the banking-house in response to notice of the draft, the cashier committed no breach of the plaintiff's instruction, "Papers to be delivered only upon payment of draft," by handing the draft and the sealed package to the drawee, and permitting him to examine the contents of the package. With or without the excluded conversation, there was no delivery of papers within the meaning of the prohibition in the instruction quoted. The acts of the cashier and of the drawee, interpreted alone or in connection with what was said by them at the time, could not in law be found to be a delivery

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of the papers, either of the draft or of the mining report. The delivery meant by the plaintiff's instruction was a surrender of the package to the drawee as his own property; and the instruction was not violated by allowing the drawee to take the draft and the sealed package into his own hands in the banking-house for the purpose of examining the contents of the package, and so determining whether he would accept the package and pay the draft. That purpose is the only one which can reasonably be found, and it negatives delivery in the sense which that word has in the plaintiff's letter of instructions.

The word "delivery" could have no double meaning in the letter of instructions, and the delivery which the defendant was prohibited from making, except upon payment of the draft, could be no other than the delivery which it was required to make upon such payment. That was clearly an absolute delivery to the drawee as his own, and thus the prohibition was not against allowing the drawee to take the draft or package into his own hands, not as his own property, but for the purpose of examination to see whether he would accept the package and pay the draft. Such a temporary and qualified possession is not a delivery. See *Maynard* v. *Maynard*, 10 Mass. 456; *Mills* v. *Gore*, 20 Pick. 28; *Markey* v. *Mutual Benefit Ins. Co.* 103 Mass. 78; *Hawkes* v. *Pike*, 105 Mass. 560; *Springfield* v. *Harris*, 107 Mass. 532, 538, 540; *Shurtleff* v. *Francis*, 118 Mass. 154; *Stevens* v. *Stevens*, 150 Mass. 557; *McCreary* v. *Boston & Maine Railroad*, 153 Mass. 300, 307; *Parrott* v. *Avery*, 159 Mass. 594.

It was not prohibited by the letter of instructions, as it might have been if the drawee was not to examine the papers. And the defendant had no reason to suppose that it was contrary to the wish of the plaintiff or of the drawer of the draft, or that it could in any way prejudice the rights of any party to the transaction. Upon the report there should be judgment for the defendant, without costs.

So ordered.

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GEORGE C. MILLER *vs.* CHARLES L. ROBERTS.

Berkshire. June 16, 1897. — September 9, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Failure of Consideration — Action — Exceptions — Statute of Frauds.

If B. receives a deed of A.'s land under an oral contract to convey to A. a farm of greater value, taking back a mortgage upon it for the difference, and, after delaying to make such conveyance, finally sells and conveys the farm to a third person without A.'s consent, A. may maintain an action against B. for the value of the first named land, and he is not obliged, before bringing the action, to restore articles of personal property of small value which were to be conveyed to him with the farm, and which he had appropriated before the conveyance by B.

A general exception to the charge to a jury brings up for revision only those portions which are inconsistent with the instructions requested.

CONTRACT, in two counts, to recover the value of a house and land in Adams, alleged to have been sold by the plaintiff to the defendant under an oral agreement. The answer, among other defences, set up the statute of frauds. Writ dated August 30, 1895. Trial in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified, among other things, as follows: "In consequence of information received I went to the defendant's home, and he wanted to know what I thought about buying the Butler Farm. I said I did not care whether I bought it or not. Previously I had had some talk with Butler about buying it. The defendant said that Butler owed him, and that if he bought the farm he wanted me to have it. He went to see Butler, and came back saying he had bargained for the farm, stock, and tools on it. He said that if I would take the place he would get his pay from Butler. I was to give a mortgage for $3,000, and a deed of my place for which I was to have $1,350. We afterward went to a lawyer's office, and I delivered to the defendant a deed of my place made out to Butler. He then said that his wife was away, so that he could not convey the farm. By agreement between us, I was to go on to the farm and take possession of the same, and the stock and tools, as soon as he got his deed

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from Butler, and he was to bring me a deed of the farm, stock, and tools when his wife returned, which was understood to be on the Sunday following. I then bought a wagon and horse of him and moved right on to the farm. On the following Sunday he came with his wife to see me on the farm, and said he would have the deed made right out. He came to the farm several times, and always said he would have the deed made out, but that he had been too busy. He kept promising to give me a deed, and excusing himself for the delay by saying he had been too busy, until about the last of July or first of August, 1896, when one Greenburg and one Stone came to look over the farm, as I understood sent by the defendant. I then went to him to inquire what that meant. He denied having sent them, but said he had sent them to look over my father's farm, which was for sale. During this interview he said those men could have the farm, stock, and tools I was in possession of for $6,000, and if they took it he would pay me well for the time I had been on it. Up to this time he had not offered me a deed. He said that it would be a good thing for him and for me if he sold it to them. This was the first conversation had about selling the farm. After this Stone, Greenburg, and Frumkin came down to look at the farm. After I saw the defendant at this time and before he sold the farm I had no further talk with him about selling it. I never agreed that the farm should be sold by him to Greenburg and Frumkin until I went to see him, and I consented to the selling of the place at that time if he would pay me for my trouble, that is, my work on the farm, and my place in Adams. Among the stock and tools on the farm at the time I went there were a horse hay rake, a mowing machine, one sow, etc. I remained on the farm about four and one half months. I left all the stock and tools I found on the place when I went there, except one sow or pig which was sold. I left two small pigs on the farm. I swapped off the mowing machine."

On cross-examination, the plaintiff testified as follows: "The first time I assisted the defendant to sell to Greenburg and Frumkin was when I went to his house about the time the men were looking over the farm, about the last of July or first of August; from that time I did everything in my power to assist him to sell the farm, stock, and tools. I did not send

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Greenburg and Frumkin to him, and I did not tell them I could not keep the place; when he came to the farm I asked for a deed and said I had nothing to show for my property; I did not tender him the mortgage I was to give back, because I had no deed; I never told him to get as much as he could for the farm; when I found I could not get a deed of the farm, stock, and tools myself, I was not unwilling that he should sell to them; he never refused to give me a deed, but promised always to do so after he got over his hurry. The horse rake that was on the farm is over the mountain where I did some haying; I took it away; I never brought it back and delivered it to him. Previous to bringing this suit I made no tender to him for the machine that I traded off, and made no effort to return the machine that was on the farm when I went there, or the amount I received for the sow; the sow on the place when I went there had a litter of pigs after I took possession, and I sold four of them; I took the money and made no tender of it to him previous to bringing this suit."

On re-direct examination, the plaintiff testified: "The defendant knew at the time that I took the horse rake to do some haying and made no objection; he did not request its return; right away after I traded the mowing machine he knew of it; he said nothing about it."

Bessie G. C. Miller, the wife of the plaintiff, testified, among other things, as follows: "The defendant, my husband, and myself had some talk in a lawyer's office; I asked what arrangements had been made, and the defendant said he had sold the farm, stock, and tools to my husband, allowing us $1,350 for our place, and would take a mortgage back for the rest; he said his wife was away, and that on her return Saturday he would make out the deed, have her sign it and bring it down; after that he came to the farm with his wife, and said he would make out a deed and bring it down; his excuse for not bringing the deed was that he was busy; after my husband saw him, after the men were looking over the place, he came to the farm, and then it was talked that it was best to sell the farm, he saying he would make it all right in selling the farm."

On cross-examination, the witness testified as follows: "The hay crop did not amount to much, and discouraged my husband;

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my husband was satisfied with the farm, providing he had the deed."

The plaintiff's father and mother both corroborated the previous witnesses as to the defendant's promise to bring the deed to the plaintiff.

The defendant testified, among other things, as follows: "I learned that the Butler Farm was for sale from the plaintiff when he came to my place the last of April or first of May. He wanted me to buy the place for him, and he would turn in his place toward it; I went to buy the farm of Butler, as his agent. Before I went to see Butler, the plaintiff agreed to convey his place direct to Butler; I saw Butler, and returned to my place and told the plaintiff what Butler would do, and in consequence of it the plaintiff said he would take the farm, and therefore I bought the farm. This conversation was before he made out his deed to Butler and gave it to me; I told him that when my wife got back I would give him a deed of the farm; I have never refused to give a deed, and he has never asked me for one; when my wife got back I went down there and told him I was willing to give a deed at any time, and he said he was not worried about it; it was my busy season, and I was remarkably busy then. I first knew the plaintiff did not want to keep the farm when the hay crop failed; I learned that he did not want to take the place, and in consequence of the information I received I went to see him. He wanted I should take it back or sell it for him; he said he could not complete his bargain, could not pay for it; I told him I could not take it back; that I was too busy to look after it or find a purchaser; about the last of July Greenburg and Frumkin came to my place; they said the plaintiff sent them; he afterward said he sent them; after seeing them I went to see him, and asked him if he was not making a mistake in selling it; he replied that he could not pay for it, and if he had to buy hay he would get into debt so he never could get out of it; he said he thought Greenburg and Frumkin would give $6,000 for it; they gave $4,500 for the farm, stock, and tools by my becoming responsible to one Cook for a claim he had on it to cut timber. While he and I were trying to sell the farm, stock, and tools to Greenburg and Frumkin, I was all the time willing to convey to him, and did not because he did not want

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to accept a deed; he never came with a mortgage and asked me for a deed; I should not have sold the farm to Greenburg and Frumkin except at his request. Previous to bringing this suit he had not offered to surrender to me or make me whole for any of the property he had sold, and made no tender of the amount of the sales; I did not consent to the plaintiff trading off the mowing machine, and knew nothing about it; I never knew anything about his taking the horse rake up to Savoy five miles away."

On cross-examination, the defendant testified as follows: "I don't know as I went there to purchase this farm as his agent; he wanted I should buy it, and I bought it for myself, and I went for myself. I understood that he expected all over and above the price of the place; after I sold by bargain to Greenburg and Frumkin, and before the deed was made, I saw the plaintiff a number of times, and I told him I could not get as much for the farm; he knew we could not get $6,000 from them; he said to me, 'I cannot trade with them, see if you can'; this was before the bargain was made; I told him what I got for the place after the deed was made; it was the first time I saw him after the trade was made."

Harry I. Greenburg, called as a witness by the defendant, testified as follows: "I first saw the plaintiff in relation to buying the farm; he sent me to the defendant; Frumkin was with me. I saw the plaintiff on the farm and told him I would buy if I could buy it right; he told me to go and see the defendant, and try and make a bargain for the place. I afterward went to see the defendant; I told him what the plaintiff said, and he came with us down to see him; the plaintiff said if he had money enough he would not let the place go. I went to see the farm again, and saw him, and he wanted to know if I had bought it; said $6,000 was cheap for the place; he tried to have me buy the place; I saw him and the defendant after that about buying the place; I told the defendant I could not give as much as he asked, and the plaintiff said, 'Don't bother with those fellows any more, I have another man to take it'; I paid $4,500 for the place, and the plaintiff gave possession about the 2d or 3d of September, 1895."

Max Frumkin, called as a witness by the defendant, corroborated the testimony of the previous witness.

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Albert T. Butler testified as follows: "When the defendant came to buy the farm he did not claim to represent the plaintiff, but himself; the first time he came to see me no price was fixed upon; the second time it was; I agreed to sell the farm, stock, and tools all at once in one deal."

Theresa Roberts, the wife of the defendant, testified as follows: "Before Greenburg and Frumkin came to our house to see my husband, the plaintiff came and said he wished my husband would take it back and sell it. He said there were some men in North Adams who wanted it, and he would like to have him go and sell it or see them, for he could n't sell it to them; he said he liked the place, but could not pay for it."

The plaintiff, recalled, testified: "I never objected to taking a deed on account of a light hay crop; I did not see Greenburg and Frumkin the first time they came to the farm; I never sent them to the defendant; he never told me what he got for the farm; I asked him, and he would n't tell; I never requested him to sell the farm to Greenburg and Frumkin; the wagon was not purchased with the farm, stock, and tools."

The defendant requested the judge to instruct the jury as follows:

"1. If the verbal contract was for the sale of the farm, stock, and tools, for one entire price, then the contract was entire, and cannot be severed. 2. If the plaintiff, under the verbal contract to purchase the farm, stock, and tools for an entire price, was put into possession of all the same, he cannot recover in this action the value or price of the lot conveyed by the plaintiff, without before suit brought having surrendered possession or offered to surrender possession of all the property, real and personal, that he had received. 3. If the plaintiff under the verbal contract in question was put into possession by the defendant of the farm, stock, and tools, and prior to the institution of this suit had not surrendered or offered to surrender possession of all the property he had so received possession of, but on the contrary had retained possession of any substantial part thereof, as the hay rake, mowing machine, and wagon, or either of them, then he cannot recover in this suit the value or price of the plaintiff's place conveyed to Butler. 4. If the plaintiff sold a part of the personal property he so received from the defendant, which he was therefore unable to surrender, it was his duty to

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offer to the defendant the proceeds of such sale or sales, or the value of the same, and without such tender prior to this suit he cannot recover the value of the price of the lot conveyed by the plaintiff. 5. If after the plaintiff took possession of the sows as a part of the personal property in question, and one or two of them thereafter gave birth to a litter of pigs, which pigs the plaintiff sold and took the proceeds of, it was the duty of the plaintiff to have tendered to the defendant the proceeds of such sales, or the value of the pigs, before bringing this action, and if he failed so to do, he cannot recover the value of said place so conveyed to Butler. 6. If the plaintiff informed the defendant or sent word to him that he, the plaintiff, did not wish to carry out the verbal contract of sale, or could not, and the defendant, relying on such information, did sell the farm, stock, and tools, then the plaintiff cannot recover for the place conveyed to Butler. 7. If the plaintiff, after taking possession of the farm, stock, and tools, influenced the defendant to sell the same, he cannot recover the value or price of the land conveyed to Butler by the plaintiff. 8. If the plaintiff assisted the defendant, and acted with him in selling the farm, stock, and tools to the purchasers Frumkin and Greenburg, and did not object to the sale, but acquiesced in the sale, he cannot recover the price of the land conveyed by the plaintiff to Butler. 9. If the plaintiff sent the purchasers Frumkin and Greenburg, or either of them, to the defendant, to purchase the farm, stock, and tools, and so conducted himself toward them as to induce them to purchase, and toward the defendant as to induce him to sell to them, he cannot complain that the sale was made, and cannot recover the value of the place sold by the plaintiff to Butler. 10. If the defendant was willing to sell and convey to the plaintiff, and sold to Greenburg and Frumkin, after the plaintiff had informed him that he could not carry out the contract, or so sold because the plaintiff wished him to do so, then the plaintiff cannot recover the value or price of the place conveyed to Butler. 11. The plaintiff must have offered to have performed all he was required by the contract to have done, or he cannot recover. 12. Upon all the evidence the plaintiff is not entitled to recover. 13. It was the duty of the plaintiff, before bringing this action, to have surrendered possession of everything he had received of the de-

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fendant, or to have offered to do so, and if there was a horse rake so received, which the plaintiff took away five miles, where it was at the time of the suit, upon the farm occupied by the plaintiff, and did not return the same or offer to return the same to the defendant prior to this suit, then this action for the price or the value of the place conveyed by the plaintiff in part payment of the farm cannot be sustained. 14. The right of the plaintiff to recover the value of the place conveyed in part payment of the farm rests upon the refusal of the defendant to convey the farm, or inability to do so by reason of having conveyed the farm to other persons, and if the plaintiff at the time the farm was conveyed was unwilling to accept a deed of the same, or was willing that the defendant should convey the farm to Greenburg and Frumkin, there was no such failure of consideration for the conveyance by the plaintiff of his place to Butler as to sustain an action for the value or price of the same upon the pleadings herein. 15. The right of the plaintiff to recover the value of the place conveyed by him upon the defendant's promise to purchase the Butler Farm and convey it to the plaintiff must be founded upon the theory that there is a failure of consideration, due to the defendant's refusal or inability to carry out his contract to convey; and if the defendant was willing to convey to the plaintiff, and instead of so doing, at the plaintiff's request and by his consent conveyed the farm to Greenburg and Frumkin, then the plaintiff cannot recover in this form of action for the value or price of the place conveyed by the plaintiff. 16. If the agreement between the plaintiff and the defendant was that the defendant should purchase the farm of Butler, and that the plaintiff should convey his house and lot in part payment of the same, and the defendant to convey the farm to the plaintiff thereafter, and take a mortgage back for $3,000, then such agreement will not support the allegation in either count of house and lot sold to the defendant by the plaintiff."

The judge declined to give the instructions requested, and instructed the jury as follows:

"The plaintiff claims that he had an oral contract with the defendant, whereby they made a trade. The defendant purchased a farm, and the plaintiff turned in towards it, or conveyed to a party for the benefit of the defendant, a house and lot in

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Adams, and with the understanding and agreement that in addition to that he would give a mortgage for $3,000, that is, his place and $3,000 for the farm, stock, and tools upon it. And the claim is that the plaintiff has conveyed the property to the defendant, but that the defendant has neglected and refused to convey the farm to him, and has put the farm out of his hands, so that it is impossible to comply with his contract, and nothing has been paid the plaintiff for the place conveyed. The plaintiff says that he conveyed to the defendant this place, but the other party refused to convey that farm to him and so the trade fell through. If there were nothing else in the case, it would be plain that there would be nothing left but to render a verdict for the plaintiff for the value of his place. If not an agreed price, then for the value, for the defendant would have the plaintiff's property, and he had, either by refusing to convey, or by conveying to somebody else, put himself in a position where he could not comply, and he would have to pay him back, either deed the farm to him (if he had not conveyed to some one else), or pay him the price of his place.

"There are other questions which come into this case, and so you have to pass upon them. There is no question that the farm has been conveyed away to some person, so that the defendant, before suit brought, could not comply with the original contract, because he had put it out of his power, and had conveyed to some one else. So when he did that, the plaintiff was in a position, if he had done nothing to vary the original contract, to demand the price; either the agreed price or the value of the place. But the defendant says that was not all there was to it, and there has been considerable testimony introduced, some part of it, in fact very much of it, to show the relation of the parties, the surrounding circumstances, etc., so that you can take their testimony in the light of the circumstances; because a thing which might be probable under one set of circumstances might be improbable under another set of circumstances. So very much testimony has been introduced to show other things bearing on the relation of the parties, by which you may test their testimony.

"The defendant says, 'True we did make a bargain, I was to buy the farm all in my own name, and the trade was that I was

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to take the place and have a mortgage of $3,000 from this plaintiff'; if they agreed to that, that was a bargain so far. The defendant was to deed to the plaintiff this farm in consideration of the mortgage of $3,000 and the place conveyed by the plaintiff. But the plaintiff says that, for one reason or another, (although the deed was given by the plaintiff to the defendant,) this deed for the farm, stock, and tools to him was delayed. The defendant says he never refused or objected until it turned out that the hay crop did not look well, and then the plaintiff became satisfied he could not pay for the farm, and wanted him to take it back or to sell it to some one else and break up the bargain; that in pursuance of that request of the plaintiff, by his assistance he did deliver the deed and did make the sale to those German people for the benefit of the plaintiff; and that the plaintiff was to have the money, whatever was left of the sale after taking out what was due to the defendant. I understand this to be the claim of the defendant, that he never refused to carry out his contract, but with the assistance and at the request of the plaintiff did sell the farm to them, Greenburg and Frumkin, as though it were the plaintiff's land; as if he had given a deed to the plaintiff, and taken from him the mortgage of $3,000.

"You have heard the story of the parties in regard to that, and the story of the persons engaged in working up the trade. Now the plaintiff says that is no such thing. The plaintiff claims, as I understand it, that this defendant had sent persons to look at the farm, that is, for a certain price, $6,000; that he never consented to anything beyond that; that when the defendant sold the farm for the sum of $4,500, (I think there is no dispute about the sum,) that was done without his consent or knowledge. That is where the two propositions stand. Now if the defendant put this property out of his hands, so he could not convey it to the plaintiff, (unless he did that by an understanding between the plaintiff and defendant that it should be done for the plaintiff's benefit, the plaintiff to have the money,) then this suit can be maintained on the part of the plaintiff, either for the agreed price that the house was put in at, if their minds met, or if no agreed price, then for the value of the house.

"The evidence is not contradicted, either by the defendant

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himself or by the two Germans, that the plaintiff said at that last interview he had with the Germans, that if they did not want that farm for $6,000, 'Let them go, I have another customer for it.' But the defendant says that after that the plaintiff told him, 'I cannot do any more with those persons; you go ahead and do the best you can.' If that is true, then that would authorize the sale by the defendant. That is one of the important elements in this case. There is no dispute, and the plaintiff admits he did what he could to help carry out the sale; but he says that he only went so far, though, as to represent it at $6,000. But the defendant says that after that fell through at $6,000, the plaintiff did say to him to do the best he could, and that in pursuance of that he made the sale at $4,500. If that is true, he had authority to sell it for the best price he could, and if he made the sale at that price, and it was understood that the sale was made for the benefit of the plaintiff, as though it was his own land, this suit cannot be maintained. If, on the other hand, there was no such understanding as to the amount, the suit can be maintained, so far as the price of the house is concerned. Now it does not follow that, if you find for the defendant, the plaintiff must lose his money. The trouble is with the pleadings. We have to try cases on the pleadings. The plaintiff would have to bring another suit in another form to maintain his claim. If it was the understanding that the farm was to be sold for the benefit of the plaintiff as though he owned it, the difference between what the farm brought and what was due the defendant would be what was coming. That cannot be recovered in this case, because the pleadings do not allow it.

"It is important that you consider the matter carefully, and determine the position of the parties at the time the sale was made to these Germans. If it was made without his consent, — I say without his consent for this price, — the plaintiff is entitled to recover for the price of his house. But, on the other hand, if it was the understanding that it was to be sold the same as if he owned the place or farm, and he sold it for the plaintiff's benefit, the verdict must be for the defendant. If the farm, as I have explained to you, was sold by the consent of the plaintiff, and for the benefit of the plaintiff, that he was to have the money, the overplus of the mortgage, and with his consent, he cannot recover."

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The jury returned a verdict for the plaintiff; and the defendant alleged exceptions "to the foregoing instructions and refusals to instruct."

M. E. Couch, for the defendant.

C. T. Phelps, for the plaintiff.

KNOWLTON, J. The principle of law on which this action is founded is, that if one has received money or other property as the consideration of an executory contract which cannot be enforced by reason of the statute of frauds, and if he then refuses to perform the contract, he is liable to the other party under an implied promise to return the money or pay for the property. *Dix* v. *Marcy*, 116 Mass. 416. *Root* v. *Burt*, 118 Mass. 521. *Cook* v. *Doggett*, 2 Allen, 439. *Basford* v. *Pearson*, 9 Allen, 387. *Abbott* v. *Draper*, 4 Denio, 51.

The evidence showed conclusively that the defendant had received a deed of the plaintiff's house and land, running to a third person for his benefit, under an oral contract to convey to the plaintiff a farm of greater value, taking back a mortgage upon it for three thousand dollars to cover the difference. It was undisputed that he had neglected for a long time to make the conveyance of the farm, and that he finally sold and conveyed it to other parties, thus putting it out of his power to perform his contract with the plaintiff. The principal questions in the case are, first, whether the defendant's conduct in selling and conveying away his farm was a breach of his oral contract with the plaintiff, which made him liable for the value of the plaintiff's house and land as property then in his hands for which the expected consideration had failed, or whether the sale was made under an arrangement with the plaintiff which would give the plaintiff a remedy in another form; and, secondly, if the sale was made in violation of his contract, whether it was a condition precedent to the plaintiff's right to recover that he should return all the benefits that he had received under the contract.

The defendant's sixth, seventh, eighth, ninth, tenth, eleventh, fourteenth, and fifteenth requests for rulings relate to the first of these questions; his first, second, third, fourth, fifth, and thirteenth, to the second.

The twelfth and sixteenth requests are sufficiently answered by the proposition at the beginning of this opinion.

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In regard to the first of these questions, the presiding judge instructed the jury, in substance, that in order to recover the plaintiff must prove that, although he had done nothing to vary the original contract, the defendant put the property out of his hands so that he could not convey it to the plaintiff, and did it without any understanding between the parties that it should be done for the plaintiff's benefit. Under the instructions, the jury could not have returned their verdict for the plaintiff without finding that the sale was made without his consent, in violation of the oral contract. Although the instructions were not as full as they might have been in regard to possible aspects of the evidence, we think they must have been understood by the jury as presenting the simple question, Did the defendant sell the property on his own account, without the consent of the plaintiff, while the oral contract remained unchanged? The finding upon this issue settled the principal controversy in the case.

The second of these questions arose upon the evidence that there were articles of personal property which were to be conveyed to the plaintiff with the farm, some of which, of small value, had been appropriated by the plaintiff before the defendant had made the conveyance to the purchasers. The defendant in his argument treats the case as if the plaintiff had rescinded the contract by his voluntary act, against the will of the defendant, and invokes the familiar doctrine that one rescinding a contract for fraud or breach of warranty, and suing to recover back the consideration, must first put the defendant *in statu quo*. *Bartlett* v. *Drake*, 100 Mass. 174, 176. But it is the defendant who has elected not to perform the contract, and has made it a nullity. By his own act he deprived himself of the protection of the contract as a justification for his retention of the plaintiff's house in the hands of the person to whom it was conveyed for his benefit. He put it out of his power to turn over to the plaintiff the expected consideration, and left himself the holder of the plaintiff's property without having given any consideration for it. The property having come into his hands in consideration of a promise which could not be enforced, and which he has repudiated, the law implies a promise to pay the fair value of it. *Root* v. *Burt*, 118 Mass. 521. *Basford* v. *Pearson*, 9 Allen, 387, 390. The right to recover this accrued to the

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plaintiff at once, and he was not obliged to restore the small articles of personal property which he had used under the contract. Of course he must account for them, but his right to sue stands upon independent grounds.

In the present case no question was raised in regard to an allowance for these articles in making up the verdict. Seemingly, they were of trifling value, but if there is dispute about them, the rights of the parties in this respect can be determined hereafter.

These are all the questions raised by the bill of exceptions. The defendant's general exception to the charge did not direct attention to any particular part of it. It brings up for revision only those portions which were inconsistent with the instructions requested. We are of opinion that the instructions given were sufficient. *Exceptions overruled.*

EDGAR F. WHITMAN & others *vs.* INHABITANTS OF NANTUCKET.

Bristol. December 9, 1896. — September 10, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Eminent Domain — "Land not clearly held in its Entirety by any known Person or Persons" — Statute — Compensation for Damages — Constitutional Law.

The intention of St. 1895, c. 442, entitled "An Act to authorize the town of Nantucket to take the island of Muskeget, or certain portions thereof, for public purposes," was not to empower the selectmen to take any land held in its entirety by a clear title by any known person or persons, but to empower them to take any specific part or all of the land of the island which was not clearly held in its entirety by any known person or persons.

The St. of 1895, c. 442, entitled "An Act to authorize the town of Nantucket to take the island of Muskeget, or certain portions thereof, for public purposes," is adequate in its provisions for compensation; and it is constitutional.

PETITION IN EQUITY, under Pub. Sts. c. 27, § 129, filed February 25, 1896, by ten taxable inhabitants of the town of Nantucket, to restrain it from the payment of any money in the

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carrying out of the provisions of St. 1895, c. 442, entitled "An Act to authorize the town of Nantucket to take the island of Muskeget, or certain portions thereof, for public purposes." The case was reserved by *Allen*, J., on the bill, demurrer, answer, and an agreed statement of facts, for the determination of the full court.

H. N. Shepard, for the petitioners.

W. C. Wait, for the respondent.

FIELD, C. J. It is contended on behalf of the petitioners that the taking described in the petition is unauthorized by St. 1895, c. 442, because the agreed facts show that an undivided fractional part of the island was held by a clear title by the Muskeget Island Club, and it is also contended that said statute is unconstitutional because it contains no adequate provision for the determination and payment of damages to those persons whose property has been taken.

St. 1895, c. 442, § 1, empowers the selectmen, on being authorized so to do by a vote of the town, to "take by purchase or otherwise any part, or the whole if deemed advisable by said board of selectmen, of the land not held by a clear title, of the island of Muskeget, for a public park." By the agreed statement of facts it appears that prior to 1692 the entire fee of the island belonged to Matthew Mayhew, who by his deed, executed and acknowledged on July 20, 1692, and recorded August 3, 1692, conveyed the island in fee to six persons. The Muskeget Island Club is the owner in fee of certain undivided parts of the island which have been derived from Nathaniel Starbuck, one of the six grantees of Matthew Mayhew. In regard to the other undivided parts, it is agreed that "the title to the other undivided interests in the island is derived largely by inheritance from Mayhew's grantees other than said Starbuck, and it is very difficult to ascertain or to state all who are the present owners of the remaining undivided interests, and so far as known no one has so ascertained them."

We think that the intention of the statute was not to empower the selectmen to take any land held in its entirety by a clear title by any known person or persons, but to empower them to take any specific part or all of the land of the island which was not held by a clear title in its entirety by any known

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person or persons. The fact, then, that certain undivided parts of the whole island were held by a clear title by the Muskeget Island Club, while the other undivided parts were held by persons who largely had derived them by inheritance from the grantees in Mayhew's deed of 1692 other than Starbuck, and whom, so far as is known, no one had ascertained, and whom it would be very difficult to ascertain, makes, in our opinion, a case within the statute of "land not held by a clear title," which the selectmen were empowered to take if authorized so to do by a vote of the town. The selectmen may purchase, if they choose, the undivided parts held by a clear title, or may take them, but in order to acquire a clear title in fee to the whole land taken they must take the undivided parts of unascertained persons.

The third section of the statute of 1895 is as follows: "The town of Nantucket shall pay all damages sustained by any person or corporation by reason of such entering upon and taking, such damages to be agreed upon by said board of selectmen and the person or corporation injured; and if the parties cannot agree, a jury may be had to determine the same, in the same manner as a jury is had and damages are determined in the case of persons dissatisfied with the estimate of damages sustained in the laying out of highways: provided, that no suit for such damages shall be brought after the expiration of three years from the date of the recording of the entering upon and taking of such land; and provided, further, that such jury shall not be chosen from the county of Nantucket." Muskeget Island is a part of the town and county of Nantucket. St. 1887, c. 88. We think that the provision for damages contained in the statute of 1895, taken in connection with St. 1887, c. 50, is to be construed as authorizing the person injured by the taking, if he cannot agree with the selectmen upon the damages, to apply to the Superior Court for the county of Bristol for a jury to have his damages determined. Such a provision is adequate. *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 394. *Old Colony Railroad* v. *Framingham Water Co.* 153 Mass. 561.

These are the only objections argued in the brief for the petitioners. Without considering whether the petition was not prematurely brought, we are of opinion that it should be dismissed. *So ordered.*

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JOSIAH S. CUMMINGS & another *vs.* ALONZO W. PERRY.

Suffolk. December 11, 1896. — September 10, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Landlord and Tenant — Implied Grant of Right to use Elevator.

A. became the lessee of a basement room in a building which was entered from the street by doors and steps, and was separated by a brick partition from the engine room, which had an elevator well in the corner next to the sidewalk, and was entered therefrom by a door and steps. In accordance with a provision in the lease, a door was cut through the partition. The lease also provided that A. was to have the use of the elevator for bringing his goods from the chambers of an adjoining estate, which he was expecting to occupy, to the basement. When this lease expired, a new lease was made to A. of the basement room, "also, with one horse power only," (which referred to the elevator,) "rooms numbered 29 and 30 in said building." A. occupied those rooms, which were in the upper part of the building, for the purpose of manufacturing his goods, which were lowered by the elevator to the engine room, and thence carried across to the basement room. The tenancy of rooms 29 and 30 was terminated under a provision in the lease, and after that the lessor prevented A. from using the elevator. *Held*, in an action therefor, that there was no implied grant of a right in A. to use the elevator for hoisting goods from the basement room to the sidewalk and lowering them from the sidewalk to the basement room.

CONTRACT, for breach of an implied covenant in a lease of certain premises in Boston. At the trial in the Superior Court, before *Bond*, J., the jury returned a verdict for the plaintiffs; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in December, 1896, and afterwards was submitted on briefs to all the justices.

A. Hemenway, (*W. A. Knowlton* with him,) for the defendant.

R. M. Morse, (*D. F. Kimball & L. Bass, Jr.* with him,) for the plaintiffs.

FIELD, C. J. The exceptions do not describe the basement room and the means of access to it from the street with exactness, but from the explanations made at the argument and the rough plan exhibited we think we are able to understand the case. As the building was originally constructed it was plainly not intended that the elevator should be used for hoisting goods

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from the basement room to the sidewalk of the street, or for lowering goods from the sidewalk to the basement room. The basement room was entered from the street by doors and steps in front of the building, and was lighted by windows from the street, as the height of the basement room extended several feet above the level of the sidewalk. In one corner of the basement had been built a boiler and engine room with an elevator well, and this room had been separated from the basement room by a solid brick partition. This engine and boiler room was entered from the sidewalk by a door and steps, and the elevator well was in the corner of this room next to the sidewalk. There was also a door opening from the sidewalk by which goods could be placed on the elevator. By neither of these doors was there originally any communication with the basement room. The original construction of the building indicated that all goods must be carried into the basement room from the street, and be carried from the basement room to the street by means of the flight of steps and the doors in the front of the building on the street, and that the elevator was to be used for the stores above the basement in connection with the sidewalk, where a door to the elevator was placed.

Cummings and Thrope first entered into occupation of the basement room on January 1, 1884, under a lease from J. Franklin Faxon, Elms, and others, for four years from January 1, 1884. This lease was dated April 3, 1883, and by it the lessors "do hereby lease unto the said Cummings and Thrope the basement room of the building known as Church Green, situated on the corner of Summer and Bedford Streets, in the city of Boston, now occupied by the Shoe and Leather Association, and [*sic*] to make the necessary connection in said room with the freight elevator now in said building, and to furnish, free of charge, the use of the same to the said lessees for the purpose of bringing their finished goods from the two upper chambers of the adjoining estate, which they are expecting to occupy for manufacturing purposes, to said basement through the connection which is already made between said elevator and said chambers, making no new openings or connections." There follows a provision that the lessees, before they take possession, shall deposit with the lessors bonds or other securities satisfactory to the lessors,

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to the amount of $2,000, as security for the payment of the rent, etc., and then occurs the following clause: "The opening from said premises to the said elevator to be made as soon as said Cummings and Thrope shall comply with the above conditions and occupy said premises."

The exceptions recite that "a door was cut, at the time of commencement of this lease, through said brick partition from said basement into the engine room, so that access might be had from said basement to said elevator by going through said doorway in said brick partition, then through and across the engine room to the further corner thereof, where the elevator was situated," etc. The exceptions continually refer to the lessees under this lease as the plaintiffs in the action, but the lessees under this lease are Josiah Cummings and Walter Thrope, who sign the lease individually and as Cummings and Thrope, while the plaintiffs are Josiah Cummings and Edward J. Cummings, partners under the name of Josiah Cummings and Company, who are the lessees in the lease from the Boston Real Estate Trust, hereinafter mentioned. We infer that one firm was the successor to the other, and that the change in the firm was made some time during the continuance of the first lease. For convenience, we shall follow the language of the exceptions, and shall consider the plaintiffs as occupying under both the first and second leases, which is perhaps as favorable a view to the plaintiffs as can be taken.

On December 28, 1887, the plaintiffs, Josiah Cummings and Edward J. Cummings, partners as aforesaid, as lessees executed a lease with the trustees of the Boston Real Estate Trust, to whom Faxon and others had conveyed the whole estate in September or October, 1886. By this lease there was demised and let to said lessees "the basement room of the building known as Church Green, at the corner of Summer and Bedford Streets, in said Boston; also, with one horse power only, rooms numbered 29 and 30 in said building. The lessors reserve the right to terminate this lease as to said rooms 29 and 30 on the first day of January, A. D. 1890, by giving the lessees sixty days' notice in writing; in case of such termination, the rent from and after January 1, 1890, shall be for the remainder of the premises four thousand two hundred and fifty dollars yearly. The

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lessors also reserve the right to enlarge the boiler room in the rear, in which case they shall first give the lessees sixty days' notice in writing."

The Boston Real Estate Trust assigned this lease to the defendant on March 1, 1888, and thereafter the defendant collected the rents "and stood in the place of the lessors."

The exceptions recite as follows: "From January 1, 1884, to December 31, 1887, these plaintiffs occupied upper chambers of an adjoining estate, called the Sprague estate, for the purpose of manufacturing their goods; a passageway was cut through the partition wall into the Church Green building to enable the plaintiffs to load their merchandise from these upper rooms on to the elevator, so they might have it lowered to the engine room, thence across the engine room to the basement named in the lease. From January 1, 1888, to January 1, 1890, in addition to a portion of the said upper chambers, the plaintiffs occupied rooms 29 and 30, which were in the upper part of Church Green building, on a floor adjoining said upper chambers in said adjoining estate. These were also used for manufacturing goods which were transferred to the basement, by means of said elevator, for sale. The plaintiffs testified that during the continuance of the lease expiring December 31, 1887, (Exhibit B,) and also during the continuance of the lease commencing January 1, 1888, (Exhibit A,) up to January 1, 1890, the plaintiffs used said elevator for the purpose of shipping from the basement all goods they handled. There was no evidence that this defendant, or any prior lessors, knew of or assented to this latter use of the elevator, unless it be contained in the following testimony, that of E. J. Cummings, plaintiff, who testified that under the old lease the use of the elevator in connection with the basement was continuous, and that it was used by the tenants throughout the building generally, and that the owners, the Trust Company, told the plaintiff that the elevator was for the use of the tenant. J. Cummings testified that the elevator was used with the basement, and the arch cut out for such use by the lessor Elms, and so continued to be used until December 24, 1889."

It is conceded on both sides that the words "with one horse power only," found in the last lease, relate to the elevator, and

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were intended to define the amount of power which the lessors agreed with the lessees to furnish in running the elevator. It is manifest that this agreement is connected with the letting of rooms numbered 29 and 30 in the building. In neither of the leases is there any express agreement for the use of the elevator in lowering goods from the sidewalk to the basement room, or in hoisting them from the basement room to the sidewalk. We infer that at some time, probably after the termination of the tenancy of the rooms 29 and 30 on January 1, 1890, the defendant prevented the plaintiffs from using the elevator to lower goods from or to hoist them to the sidewalk, or from using the elevator in any manner. This is the principal cause of action declared on, and the exceptions imply that there was some evidence of it, and although this is not so distinctly stated as it should have been, we understand that it is conceded.

The principal question in the case is whether the plaintiffs had any right to use the elevator for hoisting goods from the basement room up to the sidewalk, or for lowering them from the sidewalk to the basement room, as incidental or appurtenant to their estate in the basement room under the last lease. This claim of the plaintiffs is stated in the charge of the presiding justice as follows: "In the first place, with reference to the right of the plaintiffs to make this use of the elevator and the approach to it from the basement, in connection with the business of the basement, that is, to take goods from the sidewalk into the basement, and from the basement out on to the sidewalk, this right is not given by any express words in the lease. The lease is silent with reference to that. It merely leases the rooms, the basement and the two rooms above, so that the plaintiffs do not claim to have acquired this right to this approach and to the elevator by any express words in the lease; but they claim that it is given in the lease by virtue of the situation of the premises, and the use that had been and was made of them, the construction of the premises, and the design as to the use of the elevator in connection with the basement by the owner of the building. That by reason of the circumstances, the situation and adaptation of the building, and the use that is made of it, this right to use the elevator passed to them as an incident to the use of the basement for their purposes; or, to use a technical word, as an appurtenance,

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that is, something incidental to and connected with the principal thing, which was the use of the basement, one of the conveniences for the enjoyment of the basement which he had hired."

The presiding justice instructed the jury, among other things, as follows: "Now, having considered the facts with reference to these different matters that I have called your attention to, I will instruct you, that if the elevator and approach thereto were constructed and designed by the owner of said building to be used in connection with said basement, and the other parts of said building, for the purposes claimed by the plaintiffs; and the elevator and approach were used by the plaintiffs for the purposes claimed by them in connection with the basement, in carrying on business therein, with the knowledge of the lessors at the time of their lease to the plaintiffs, commencing January 1, 1888, and if from the date of said lease to the time of its assignment to the defendant, the elevator and approach were used by the plaintiffs for the purposes now claimed by the plaintiffs, in carrying on their business in said basement, with the knowledge and consent of said lessors, as a privilege belonging to the plaintiffs as the lessees of the basement, then the defendant would not have the right, upon becoming the assignee of the lease, to prevent the use and enjoyment of that privilege, the use of the approach, and the use of the elevator; and if he did prevent the use of it by the plaintiffs, he would be liable to pay any damage which they sustained by reason of that prevention."

This court has held the doctrine of implied grants with a good deal of strictness. *Buss* v. *Dyer*, 125 Mass. 287. *Randall* v. *McLaughlin*, 10 Allen, 366. *Lowell* v. *Strahan*, 145 Mass. 1. *Johnson* v. *Knapp*, 150 Mass. 267. *Case* v. *Minot*, 158 Mass. 577. It is true that, when a person hires a room in a building, a right to use the apparent means of access and exit often passes as appurtenant to the premises hired. In modern buildings of great height this doctrine we assume may be applied to elevators. Whether an active duty to maintain an elevator for the use of tenants can be implied may be open to question, but if an elevator is in fact maintained by the landlord, the duty to permit tenants to use it, we assume, may be implied if this is reasonably necessary for the beneficial occupation of the rooms let,

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and if from the construction of the elevator and of the passageways it is apparent that the elevator was intended for the use of the tenants. But in the present case it is apparent that the elevator was not intended originally to be used by the occupants of the basement room; that although it might have been convenient for them to use it in connection with the sidewalk, yet suitable means of ingress and egress had been furnished by the steps and doors from the basement room into the street; that at no time was there any access to the elevator directly from the basement room; that the elevator did not adjoin the basement room, and the way through the engine and boiler room to the elevator from the basement room was not a common passageway, but that for the purpose of connecting the basement room with certain rooms in the upper part of the building or of the adjoining building, access to the elevator from the basement room by a way through the engine and boiler room had been provided; that this was originally done "for the purpose of bringing their finished goods from the two upper chambers of the adjoining estate, which they are expecting to occupy for manufacturing purposes, to said basement"; and that the only reference to the elevator contained in the last lease is in connection with the tenancy of the rooms 29 and 30 in the building. Under these circumstances a majority of the court think that the grant of a right to use the elevator for the purpose of hoisting goods from the basement room to the sidewalk, and of lowering them from the sidewalk to the basement room, cannot be implied. The fact, if it be one, that the defendant or his predecessors in title permitted the plaintiffs to make such a use of the elevator under the circumstances stated cannot establish the right. The express agreements concerning the elevator contained in the leases tend to negative the right to such a use of it, and the history of the opening into the engine room and of the use of a way across it to the elevator repels any implication of the right to use the elevator for all purposes for which it might be convenient to use it in connection with the basement room. In the opinion of a majority of the court, upon all the evidence recited in the exceptions, which purports to be all the evidence material to this issue, the presiding justice should have ruled, as requested by the defendant, that the plain-

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tiffs showed no right to use the elevator after their tenancy of rooms 29 and 30 had been terminated, and no right to use it at any time for the purpose of hoisting goods to the sidewalk from the basement room, or of lowering them from the sidewalk to the basement room. *Exceptions sustained.*

NASHUA AND LOWELL RAILROAD CORPORATION *vs.* BOSTON AND LOWELL RAILROAD CORPORATION.

Suffolk. March 22, 1897. — September 10, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Review — Superior Court — Equity Practice — Report — Decree — Jurisdiction — Discretion of Court.

A bill of review may be brought in the Superior Court to review a final decree in equity made by that court.

A bill of review, brought to review a final decree in equity for error of law apparent on the face of the record, properly should set out in full the pleadings, proceedings, and final decree, but not the evidence.

Although it is not the practice of the full court to rehear parties upon questions which have been once argued and decided, or to hear them upon questions of law which have been waived or abandoned at a former hearing, yet it, in its discretion, may do so.

A justice of the Superior Court has the right to report to the full court an equity case upon the pleadings and facts found by him, without deciding the case.

A final decree in equity of the Superior Court, entered in accordance with a rescript of this court, after a hearing of the case on report, cannot be reversed by a bill of review brought in the Superior Court, on the ground that this court has erred in law; but the remedy is by a petition to this court for a rehearing, which is addressed to its discretion.

BILL OF REVIEW, filed in the Superior Court on November 23, 1895, to review a decree of that court, made on October 31, 1895, in a suit in equity, for error of law apparent on the face of the record. A decree was entered dismissing the bill; and the plaintiff appealed to this court. The facts appear in the opinion.

F. A. Brooks & G. S. Hale, for the plaintiff.

J. H. Benton, Jr., for the defendant.

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FIELD, C. J. The defendant filed in the Superior Court a motion to dismiss the bill, and a demurrer. The motion to dismiss the bill was stated to be "because it doth not appear that the same was filed by leave of court." The causes of demurrer are stated to be, "first, that said bill doth not appear to be filed by leave of court, first had and obtained; secondly, that the matters and things in said bill set forth do not in manner and form in which the same are stated entitle the plaintiff to the relief prayed for, or to any relief." The Superior Court overruled the motion to dismiss, sustained the demurrer, and dismissed the bill with costs; and the plaintiff appealed to this court from the decree dismissing the bill. The cause coming on to be heard in this court, it appeared that the plaintiff had not set out in the bill a full and exact copy of the pleadings, proceedings, and decrees in the original suit in the Superior Court, and leave was obtained in this court to file a certified copy of the same in this court, without prejudice to the rights of the defendant to contend that the defect, if any, in the bill as filed in the Superior Court, could not be cured in this way. The Superior Court undoubtedly overruled the motion to dismiss, on the ground that no leave of the Superior Court was necessary to file a bill of review for error of law appearing on the face of the record, which is undoubtedly the law. *Elliott* v. *Balcom*, 11 Gray, 286. Story, Eq. Pl. § 405.

The bill of review states, in substance, that the plaintiff brought an action at law against the defendant in the Superior Court on September 30, 1884, on a certain claim therein alleged, to which, by amendment of the declaration, three other claims were added; that said action, by leave of said court, was amended into a suit in equity, and a bill in equity was substituted for the declaration at law; that the defendant appeared and demurred to the bill for want of equity; that the demurrer was overruled, and the defendant answered and afterwards amended its answer, when issue being joined, the cause was heard by a justice of the Superior Court, who found for the defendant on the first and second claims set forth in the bill, and for the plaintiff on the third and fourth claims, and entered a decree for the plaintiff for a certain sum of money on each of said third and fourth claims as follows. "It is ordered, adjudged, and decreed as follows, viz.: That the

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plaintiff is entitled to recover and do recover of the defendant the sum of twenty-five hundred seventy-four $\frac{82}{100}$ dollars, with interest thereon from and after April 30, 1880, said sum and interest amounting at this time to forty-three hundred thirty-four $\frac{80}{100}$ dollars, on account of the third claim set forth and described in the plaintiff's bill of complaint, being a claim for thirty-one per cent of the value of joint material used by defendant in building the Middlesex Central Railroad. Also, that the plaintiff is entitled to recover and do recover of the defendant the further sum of $9,711.88, with interest thereon from and after April 30, 1880, . . . on account of the fourth claim set forth and described in the plaintiff's bill of complaint, being the claim for the value of three hundred tons of new iron rails to be placed by the defendant in the plaintiff's track, but not so placed. . . . Also, that the plaintiff recover its costs of suit, to be taxed by the clerk." From this decree the defendant appealed to this court. As the plaintiff did not appeal, the first and second claims were out of the case on the appeal, and the third and fourth claims were thereafter called the first and second claims. The case was heard on the appeal by this court, and on October 21, 1892, said court sent down to the Superior Court the following rescript: "It is ordered that the clerk of said [Superior] Court make the following entry under said case in the docket of said court, viz.: 'Decree for the plaintiff for $3,010.68, with interest, unless the Superior Court, by its finding, has determined or shall determine that, in point of fact, the cost of improved condition of the defendant's road, which was agreed to be $9,711.88, was paid from the separate funds of the plaintiff, and not from the joint fund of the two railroad companies.'" The decision of this court is reported in 157 Mass. 268.

Afterwards, the plaintiff obtained leave of the Superior Court to amend its bill, and the bill was accordingly amended, and the defendant amended its answer, setting up, among other things, that the claim had been adjudicated in a former suit between the same parties in the Circuit Court of the United States for the District of Massachusetts. Thereupon the case was referred by the Superior Court to a master, and a hearing had before the master, who made his report to that court. It is alleged that, at the hearing before the master, certain evidence was offered by

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the plaintiff and admitted by the master, subject to the objection of the defendant that it was not competent, and was reported by the master to the Superior Court for its consideration, and by that court was excluded as incompetent, subject to the objection and exception of the plaintiff. The cause then came on to be heard in the Superior Court, upon the last claim made by the plaintiff, called after the first appeal the second claim; and the presiding justice of the Superior Court, against the objection of the plaintiff, declined to pass upon the issues raised by the pleadings relating to that claim, but reported the cause upon the pleadings and the facts found by him to this court for its determination. This court entertained the cause so reported; considered among others the new defence introduced under the amended answer of the defendant in the Superior Court, and on September 5, 1895, sent down to the Superior Court a rescript as follows: "Decree for plaintiff for $3,010.68, and interest, unless in point of fact the demand in suit was adjudicated upon in the former suit." The decision of this court is reported in 164 Mass. 222.

Afterwards, to wit, on October 31, 1895, the cause came on for final hearing in the Superior Court, and that court on that day entered the following decree: "It is ordered, adjudged, and decreed, in pursuance of said rescript, that the plaintiff is entitled to recover and do recover of the defendant the sum of three thousand and ten and $\frac{68}{100}$ dollars, with interest thereon from and after April 30, 1880; said sum and interest amounting to ($5,810.61) five thousand eight hundred and ten and $\frac{61}{100}$ dollars; also that the plaintiff recover its costs of suit, to be taxed by the clerk." It is this decree which the plaintiff in his bill of review seeks to have reviewed, and reversed. It is evident that in the Superior Court on the final hearing it was either conceded by the parties or found by that court that this claim had not been in fact adjudicated in the Circuit Court of the United States; if it had been, that adjudication would have been a bar, and the bill would have been dismissed.

When the case was before this court the second time, on the report of the presiding justice of the Superior Court, the plaintiff argued that this court, in the first rescript, had made a mistake in reducing the amount of the principal sum recovered in

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the decree from $9,711.88, as originally found by the Superior Court, to the sum of $3,010.68, but this argument did not prevail. The plaintiff, in this bill of review, does not in form ask the Superior Court to reverse its decree of October 31, 1895, on the ground that this court made a mistake in the substance of each of its decisions in the case, but on the following ground as stated in the bill: "And your orator shows it is advised and believes that the Supreme Judicial Court did not acquire any jurisdiction of said cause, by reason of the report thereof made to said court in February, 1895, by the presiding justice of this [the Superior] court, under the circumstances above stated, and that said rescript of September 5th, 1895, was without any force or effect in law, for the purpose of determining the amount which the plaintiff was entitled to recover in said cause, and was not warranted by the allegations of the plaintiff's bill of complaint, or by any evidence taken or offered in the case by the defendant. And your orator shows that afterward, on the 31st day of October, 1895, said cause came on for final hearing in this [the Superior] court, upon the motion of the defendant that a decree be entered therein, in accordance with the rescript of said Supreme Judicial Court of September 5th, 1895, and that this [the Superior] court then entered a decree therein, in the words and figures following, to wit." Then follows the decree hereinbefore recited.

We think that a bill of review may be brought in the Superior Court to review a final decree in equity made by that court, in the same manner as a bill of review may be brought in the Supreme Judicial Court when held by a single justice to review a final decree made by that court. Such decrees are constantly made in either court by single justices, and no appeal taken to the full court, so that the only method in such cases of correcting errors of law apparent on the face of the record is by a bill of review. As under our practice the decree does not recite the pleadings, a bill of review properly should set out in full the pleadings, proceedings, and final decree, but not the evidence. *Buffington* v. *Harvey*, 95 U. S. 99. *Putnam* v. *Day*, 22 Wall. 60. *Whiting* v. *Bank of the United States*, 13 Pet. 6. We think that if the full court is to determine on appeal whether there is error of law apparent on the record of the Superior Court

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in a suit in equity, it should have before it a transcript of the whole record, as fully as is required in proceedings on writs of error in actions at law. This bill originally was defective in not setting out the full record in the case. Parts of the record were set out, not *in totidem verbis*, but only according to the pleader's conception of their substance and effect. It would be a good practice if an exemplified or certified copy of the whole record were inserted or attached to such a bill, although the forms usually given seem not to require this, but only that the pleadings, proceedings, and decrees should be set out in full, and not by a general statement of their contents. The demurrer to the bill was, however, not put upon this objection. Whether this defect in the bill properly could be supplied in this court by furnishing a certified copy of all the material parts of the record, we need not decide. See *Groce* v. *Field*, 13 Ga. 24. We are content to assume that this may be done by leave of this court.

It is a matter of more importance whether the justices of the Superior Court, or of this court, when sitting as single justices, can reverse final decrees in equity entered in obedience to the rescript of the full court, on the ground that the full court in hearing and determining a cause on report or appeal has made some mistake of law, either in entertaining the cause, or in determining the questions of law involved in it, and that therefore the rescript of the full court should be treated as of no effect. A bill of review will not lie in the court below while an appeal is pending in the appellate court. *Kimberly* v. *Arms*, 40 Fed. Rep. 548. An appeal will not lie from a decree entered in accordance with the rescript or mandate of the appellate court. *Lincoln* v. *Eaton*, 132 Mass. 63, 69. *Humphrey* v. *Baker*, 103 U. S. 736. If there is any real ground for contention that the decree entered in the court below does not conform to the rescript or mandate of the full court, an appeal lies that this may be determined. *Sewall* v. *Sewall*, 130 Mass. 201. A bill of review for errors of law apparent on the face of the record will not lie after the final decree has been affirmed on appeal. See *Evans* v. *Hamlin*, 164 Mass. 239, 240; *Franklin Savings Bank* v. *Taylor*, 53 Fed. Rep. 854, 866; *Hurt* v. *Long*, 90 Tenn. 445; *Watkins* v. *Lawton*, 69 Ga. 671; *Felty* v. *Calhoon*, 147 Penn. St. 27.

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In *Southard* v. *Russell*, 16 How. 547, 570, the Supreme Court of the United States say: "The better opinion is, that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree. Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits."

In *Putnam* v. *Clark*, 8 Stew. (N. J.) 145, the Court of Errors and Appeals of New Jersey deny that leave must first be obtained of the appellate court to file a bill of review in the court below on the ground of newly discovered evidence, and say that the petition must be made to the court where the decree is entered, but that court say: "It must be borne in mind that there is a distinction in practice between an application for a review on the ground of error on the face of the decree, and one based on newly discovered evidence. In the former, no bill of review can be filed after the decree has been passed upon by the appellate tribunal, but in the latter it is otherwise." Whatever the rule may be in a bill of review on newly discovered evidence, the authorities are substantially unanimous that a bill of review for errors of law apparent on the face of the record will not lie after the decree has been affirmed by the appellate court, and a decree entered in accordance with the mandate of the appellate court is equivalent to a decree affirmed by the appellate court. *Kingsbury* v. *Buckner*, 134 U. S. 650, 671.

An examination of the original papers in the case, as reported in 164 Mass. 222, shows that every question of law which the plaintiff seeks to raise in this bill of review could have been raised by the plaintiff at the hearing of the case in this court on

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the report of the justice of the Superior Court. The plaintiff could have had the testimony of Mr. Bartlett and Mr. Brooks,* which was taken before the master and reported by him, and which the justice of the Superior Court excluded against the plaintiff's exception, brought before this court if he had asked for it, but no such request appears to have been made. *Snow* v. *Boston Blank Book Manuf. Co.* 153 Mass. 456. It appears by the report of the justice of the Superior Court, which was before this court at that hearing, that the plaintiff contended that the justice of the Superior Court was legally required to make a finding in the case on the issues between the parties, but the justice ruled otherwise, and reported the case upon the pleadings and the facts found by him for the consideration of this court. It was open to the plaintiff to contend at the hearing in this court that the justice of the Superior Court could not lawfully report the case in this manner, but so far as we are aware it made no such contention in this court.

It is not the practice of the full court to rehear parties upon questions which have been once argued and decided, or to hear them upon questions of law which have been waived or abandoned at a former hearing, but it in its discretion may do so. *Pingree* v. *Coffin*, 12 Gray, 288, 324. A justice of the Superior Court has the same right to report an equity case upon the pleadings and facts found by him without deciding the case as a justice of this court has, and it is a well known practice to report such cases to the full court upon the pleadings and the facts found by the court, or on the pleadings and the facts found by a master, where no exception is taken to his report, and there is no other evidence, or upon the agreed facts, where all the facts are agreed, without any decision of the case. *Methodist Episcopal Society* v. *Akers*, 167 Mass. 560. *Stevens* v. *Mulligan*, 167 Mass. 84. *Sawyer* v. *Seaver*, 166 Mass. 447. *Murphy* v. *Barnard*, 162 Mass. 72. *Mulcahy* v. *Fenwick*, 161 Mass. 164. *Taft* v. *Stoddard*, 141 Mass. 150. St. 1883, c. 223, § 2. It does not appear from the record of the original suit that any party asked that the evidence be taken and reported pursuant to Pub. Sts. c. 151, § 26; St. 1883, c. 223, § 2; and Chancery Rule XXXV.

* The former was the treasurer of the defendant corporation, and the latter was the president of the plaintiff corporation.

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The plaintiff complains in its brief that the justice of the Superior Court erred in allowing the defendant's exceptions to a part of the amended bill, and in ordering a portion of the bill to be stricken out. If the plaintiff had excepted to this, or had appealed from the order, which does not appear, the question whether the order was a proper one could have been brought before the full court when the case was reported by the justice of the Superior Court, and the plaintiff could have argued it if it had seen fit. This alleged error of law is not pointed out in the bill of review. Every one of the alleged errors of law now relied on in argument, if the plaintiff had desired it, could have been brought before the full court when the case was reported by the justice of the Superior Court, and could have been argued before the full court. The plaintiff's real grievance is that the full court reduced the principal sum which it is entitled to recover on account of the claim for the value of three hundred tons of iron rails, from $9,711.88, which the Superior Court originally found due, to $3,010.68; and although more than one attempt has been made to convince the full court that its decision in this matter is erroneous, the attempt hitherto has been unsuccessful.

By a bill of review filed in the Superior Court the attempt is now made to convince that court that the full court acquired no jurisdiction to consider the case when it was reported by the justice of the Superior Court, although the jurisdiction of the court was not disputed at the time of the hearing before it. The question of the jurisdiction of the full court over the case on that report necessarily was involved in the decision of the case. It is enough to say that decrees of the Superior Court, entered in accordance with the rescript of the full court, cannot be reversed in this manner. The only remedy is by a petition for a rehearing to the full court, which is addressed to its discretion. *Winchester* v. *Winchester*, 121 Mass. 127.

Bill dismissed, with costs.

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SAMUEL KENISTON, administrator, *vs.* CHARLES MAYHEW & others.

Dukes County. March 25, 1897. — September 10, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Life Estate in Residue, with Power of Disposing of it during Life — Gift of Savings Bank Books not Perfected — "Nearest of Kin" construed to mean "Nearest Blood Relations."

After giving by will a pecuniary legacy to her "husband's nearest relatives," a testatrix provided, "Should my sister S. survive me I do give and bequeath to her for her personal benefit during her lifetime all the remainder of my property either in moneys, real estate, or personal property, and to be disposed of at her discretion, at her decease to go to my nearest of kin." *Held*, that S. took a life estate in the residue, real or personal, with the power of disposal during life, but with no power of disposal by will, and that on her decease all not disposed of passed to the nearest of kin of the testatrix; that the proceeds of real estate sold by S. in her life time deposited in a savings bank in three accounts, one in her own name, one in her name as trustee for A., and one in her name as trustee for B., were a part of the estate of the testatrix, the evidence in the case of the deposits in trust failing to show a perfected gift; and that the words "nearest of kin" in the residuary clause meant "nearest blood relations," who were to be determined as of the death of the testatrix and not as of the death of S.

BILL IN EQUITY, filed March 14, 1896, by the administrator with the will annexed of the estate of Eliza M. Ripley, to obtain the instructions of the court as to the construction of the will. Hearing before *Barker*, J., who reported the case for the consideration of this court, in substance as follows.

At the time of her death, on September 6, 1889, Eliza M. Ripley was a widow without children, and of the age of sixty years. Her heirs at law and next of kin were her three brothers, Charles Mayhew, of Edgartown, Massachusetts, William E. Mayhew and Henry H. Mayhew, both of San Francisco, California; her sister, Mary W. Sprague, of Edgartown; and the following nephews and niece: Sarah J. Eldridge and John L. Mayhew, both of Cottage City, children of Joseph M. Mayhew, a brother of the testatrix, who died before her will was made; and Frank B. Norton, of San Francisco, California, a son of Sarah Norton, a deceased sister of the testatrix, who had died before the testatrix's will was made. When Mrs. Ripley, the

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testatrix, made her will, and when she died, her three brothers and the sister above named as living at the time of her death, were her nearest relatives, but she had other heirs at law, as above stated. When the will was made, both the testatrix and her sister, Mary W. Sprague, were so old that the testatrix knew that neither of them could thereafter have children. Mary W. Sprague had a husband alive, with whom she did not usually live, and she had never had a child. The husband of Mrs. Sprague died after the death of the testatrix and before the death of Mrs. Sprague, which occurred on October 12, 1895, when she was sixty-two years of age. She died intestate.

After a pecuniary bequest to a church, the will provided as follows: "I also do give and bequeath to my husband's nearest relatives $1,000 (one thousand dollars) to be divided equally between them. Should my sister Mary W. Sprague survive me I do give and bequeath to her for her personal benefit during her lifetime all the remainder of my property either in moneys, real estate, or personal property, and to be disposed of at her discretion, at her decease to go to my nearest of kin."

Mrs. Ripley left several pieces of land, comprising a dwelling or homestead, worth about $2,000, and certain wharf property; also the furniture of the homestead, worth about $500. After the proof of her will, Mrs. Sprague entered into possession of the homestead, received the furniture from the administrator, and had possession of the wharf property. She used the homestead and furniture until her death, made no disposition of either in her lifetime, and died intestate. More than five years before her death, she sold the wharf property by a warranty deed for the sum of $3,000, which she deposited in the New Bedford Institution for Savings, on May 6, 1890, in three deposits of $1,000 each, — one in her own name, one in the name of Mary W. Sprague in trust for Charles Mayhew, and one in the name of Mary W. Sprague in trust for Nancy B. Mayhew. On April 10, 1895, the first mentioned deposit amounted with accrued interest to $1,227.91, and on that day Mrs. Sprague drew on the deposit on that account the sum of $500, leaving $727.91, upon which interest had since accrued. She drew nothing on account of either of the deposits except the $500. Beyond this, nothing was shown to indicate the purpose of putting one deposit in her

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own name as trustee for Charles Mayhew, and one in her own name as trustee for Nancy B. Mayhew, and the parties agreed that the only act done by Mrs. Sprague indicating an intention to give the deposits to Charles and Nancy B. was the form of the deposit indicated by the book.

After the death of Mrs. Sprague, the homestead and the furniture came back to the possession of the plaintiff as administrator with the will annexed. After the death of Mrs. Ripley and before the death of Mrs. Sprague, Henry H. Mayhew, their brother, died on November 28, 1891, intestate, leaving a widow, Georgie E. Mayhew, and children, Henry C. Mayhew, Joseph R. Mayhew, William W. Mayhew, and Lizzie Mayhew, all minors, and wards of Littleton C. Wimpenny, who was the special administrator of the estate of Henry H. Mayhew.

C. G. M. Dunham, for Charles and William E. Mayhew.

B. T. Hillman, for the administrator and heirs of Henry H. Mayhew.

W. M. Butler, for John L. Mayhew and Sarah J. Eldridge.

FIELD, C. J. In our opinion, Mrs. Sprague took under the residuary clause of the will of Mrs. Ripley a life estate for her personal benefit in all the residue of the property, real or personal, of Mrs. Ripley, with the power in Mrs. Sprague of disposing of it or any part of it at her discretion during her life, but with no power of disposing of it by will, and on her decease all of the property not disposed of by Mrs. Sprague in her lifetime passed to the nearest of kin of Mrs. Ripley. *Welsh* v. *Woodbury*, 144 Mass. 542. *Kent* v. *Morrison*, 153 Mass. 137.

The $3,000 received by Mrs. Sprague for the conveyance of the wharf property, so far as it can be identified, is subject to the provisions of the will unless it was disposed of by Mrs. Sprague in her lifetime. The two sums of $1,000 each, deposited in her name in the New Bedford Institution for Savings, one in trust for Charles Mayhew and the other in trust for Nancy B. Mayhew, cannot be considered as given to Charles Mayhew and Nancy B. Mayhew so as to have become their property, as the facts found by the justice who reported the case are insufficient to establish a completed gift. These deposits with the accumulated dividends, as well as what remains of the $1,000 deposited by Mrs. Sprague in her own name and not in trust, with the

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accumulated dividends, are a part of the estate of Mrs. Ripley. *Sherman* v. *New Bedford Five Cents Savings Bank*, 138 Mass. 581. The words "nearest of kin" in the residuary clause mean nearest blood relations. *Swasey* v. *Jaques*, 144 Mass. 135. This construction is confirmed by the testatrix's use of the words "husband's nearest relatives," in the preceding clause. We think that these nearest of kin should be determined as of the death of the testatrix, and not as of the death of Mrs. Sprague. The power of disposition given to Mrs. Sprague did not enlarge her interest in the property beyond that of a life estate, and Mrs. Sprague is not the sole next of kin. *Abbott* v. *Bradstreet*, 3 Allen, 587. *Minot* v. *Tappan*, 122 Mass. 535. *Fargo* v. *Miller*, 150 Mass. 225.

The nearest of kin are therefore the brothers of the testatrix; namely, Charles Mayhew, William E. Mayhew, and Henry H. Mayhew, and her sister, Mrs. Sprague. Henry H. Mayhew and Mrs. Sprague have deceased intestate since the death of the testatrix, but the shares of each belong to his or her estate. The real property descends to his or her heirs, and the personal property is to be paid to the administrator of his or her estate. It appears that Littleton C. Wimpenny is special administrator of the estate of Henry H. Mayhew. The husband of Mrs. Sprague died after the death of the testatrix and before the death of Mrs. Sprague, and Mrs. Sprague never had a child. It does not clearly appear that any administrator of Mrs. Sprague's estate has been appointed. The heirs and distributees of her estate appear to have been made parties, but properly an administrator of her estate should be appointed to receive her share of the personal property. The petitioner is entitled to instructions as to the meaning of the will, so far as the personal property is concerned, but it does not appear that he is charged with any duty as to the real property, although we have construed the will with reference to both real and personal property, as the same disposition is made of both.

Decree accordingly.

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ASA E. FAIRMAN *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Hampden. September 22, 23, 1896. — September 13, 1897.

Present: FIELD, C. J., MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Railroad — Negligence — Law and Fact — Exceptions — Employers' Liability Act — "Charge or Control" of Train — Evidence — Trial — Verdict.

It cannot be said, as matter of law, in an action against a railroad corporation for personal injuries occasioned to a fireman on a locomotive engine by a collision between the engine and a snowplough, that he was negligent in not seeing a signal, if the evidence is that, at the time of the collision, the air was filled with driving snow, so that it was impossible at times to see anything.

Under an exception to the instructions given at a trial, "in so far as they conflict with the instructions prayed for," an objection to a particular portion of the charge, to which the attention of the judge was not called, is not open.

A railroad had two main tracks, one called the north track, which was regularly used for trains going west, and the other the south track. On the occasion of a severe snowstorm, the north track was blocked with snow between B. and W., and the trains going each way were using the south track between those stations. C. had charge of the single tracking between such stations, and had given an order, which was obeyed, to hold all east-bound trains at W., west of a cross-over switch leading from the south track to the north track, several hundred feet west of W. He then gave an order in writing to the engineer of a west-bound train which allowed him to go only to W. The cross-over switch was not in position to allow a train to pass from the south track to the north track, and the train proceeded without stopping and collided with a snowplough standing on the south track, and the fireman on the engine was injured. There was evidence that the air was filled with driving snow so that at times a signal could not be seen. *Held*, in an action against the railroad corporation for the injury, that, although there was not a literal compliance with the rules of the corporation, it could not be said that there was any negligence on C.'s part which contributed to the accident, nor anything to show that he was bound to give minute directions to the person in charge of the switch at W. as to the setting of the switch. *Held, also*, that the jury might have found that the engineer of the train was negligent, in continuing to run upon the south track without seeing whether or not a proper signal was out, showing that track to be safe.

A person on a railroad having control of a switch, or of a signal, is not in "charge or control" of a train, within the meaning of the employers' liability act, St. 1887, c. 270, § 1, cl. 3.

In an action against a railroad corporation for personal injuries occasioned to a fireman by reason of the engine on which he was employed colliding with a snowplough standing on the track, one count in the declaration charged negligence of some person in the defendant's service who had the charge or control of a switch upon its railroad, specifying the negligence as not notifying the plaintiff,

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or the person who had the charge or control of the train, that the switch was not properly set to cross from one track to another, called the north and south tracks. The evidence showed that C., who had charge of the switch house, after a preceding train had passed from the south track to the north track, changed the switch so that a train going in the same direction would not cross over to the north track, but would continue on the south track, and there was also evidence that this was negligence on his part; but it appeared that the act of changing the switch showed a signal that a train could not cross over. *Held*, that the defendant was entitled to a ruling that the plaintiff could not recover on that count.

A station agent on a railroad, whose duty it is to transmit to the men in charge of the trains as they arrive at the station on a certain occasion the orders of a person in charge of the single tracking at this point, is not in "charge or control" of a train, within the meaning of the St. of 1887, c. 270, § 1, cl. 3, if there is nothing to show that he gave any orders or assumed any control.

In an action against a railroad corporation for personal injuries occasioned to a fireman in its employ by a collision, a general exception to the admission in evidence of the rules of the corporation will not be sustained, but if any particular rule was inapplicable, the attention of the judge should have been called to it.

If the verdict in an action the declaration in which contains several counts, is a general one, and the defendant was entitled to have some of his requests for instructions granted, which were refused, a new trial will be ordered.

TORT, in eight counts, under the employers' liability act, St. 1887, c. 270, as amended by the St. of 1894, c. 499, for injuries sustained by the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

W. H. McClintock, for the plaintiff.

LATHROP, J. The bill of exceptions states some facts about which there appears to be no dispute, and then gives the testimony of various witnesses. There are exceptions to the admission of evidence, to the refusal to give several instructions requested, and to certain portions of the charge to the jury.

The accident occurred on February 9, 1895. On the previous day there had been a heavy fall of snow, which some of the witnesses testified they thought was the worst since the blizzard of 1888. At the time of the accident the wind was blowing a gale. The plaintiff was fireman on an extra locomotive engine, No. 130, that was used to help a western express train, No. 15, from Springfield to Albany. Behind engine No. 130 was the regular engine of the train, and then came five cars. The

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plaintiff's regular occupation was as fireman on engines drawing freight trains, and his run most of the time was between Springfield and Pittsfield.

The defendant's road has two main tracks, and train No. 15 left for Albany on the north main track, the track regularly used for trains going west, and was flagged at Becket shortly before three o'clock in the afternoon. At Becket it found train No. 7, also a western express, standing ahead of it. About three and a half miles west of Becket is Washington station, which is almost at the top of the grade of the defendant's railroad between Springfield and Pittsfield. Between Becket and Washington the north main track was blocked with snow, and the trains going each way were using the south main track between these stations. When train No. 15 had been at Becket about twelve or fifteen minutes, train No. 7 went upon the south main track and proceeded westward. After about ten or twelve minutes, train No. 15 did the same, getting orders to proceed from one Cone, the station agent at Chester, who also had charge of the single tracking between Washington and Becket. Cone gave an order in writing to the engineer of engine No. 130, and also to the conductor of the train. This order was as follows: "You hereby have the right of road, and may now use the south track as single track from Becket to Washington."

About seventy-five feet west of Washington station, on the north side of the north main track, is a signal pole with a semaphore signal. Beyond that, three or four hundred feet, is the cross-over switch, leading from the south main track to the north main track, and beyond that is the switch-house, or tower, as it is called. About three hundred feet west of the tower, on the south main track, stood a snowplough and engine, and about fifty feet west of the plough were a snow scraper and engine. The cross-over switch was not in position to allow a train to pass from the south main track to the north main track, and train No. 15 proceeded, without stopping, on the south main track, and came into collision with the snowplough, and the plaintiff was injured by the collision. These are the general facts, but there are others which will be stated in considering the exceptions.

In addition to the allegations in the declaration, the plaintiff had filed specifications of his claim under the various counts.

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At the close of the evidence, the defendant asked for a number of instructions, all of which the judge refused to give, either in form or substance, but gave other instructions, to which, so far as they conflict with the instructions prayed for, the defendant duly took exception, and on all the other questions in the case the court gave full and proper instructions, to which no exception was taken. Parts of the charge only are given, and on the statement in the bill of exceptions we must assume that they relate to the instructions requested; and the case has been argued on both sides on this assumption. The instructions given, so far as they appear in the bill of exceptions, are very general in their character, and make no reference to any count, except incidentally, and to no specification. We proceed to consider the defendant's requests for rulings, so far as they were insisted upon at the argument before us.

1. The first instruction requested was: "Upon the whole evidence . . . the plaintiff is not entitled to recover." The ground upon which it is contended that this ruling should have been given is that the plaintiff was negligent. The plaintiff testified that, when the engine was about opposite the station at Washington, the engineer asked him if he could see the switch; that he looked out of the left hand window, and reported to the engineer that he did not see it; that he could not see anything; and that it was impossible to see it. He further testified that a fireman has to look at the signals, and that he did it when regularly firing. We cannot say, as matter of law, that the fireman was negligent in not seeing the signal. The evidence from all the witnesses that testified as to the weather is that the air was filled with driving snow, so that it was impossible at times to see anything.

On the question of the plaintiff's negligence, we think that the illustration put by the judge in his charge to the jury might well have misled them.* He, in effect, said that the plaintiff's

* The instructions on this point were as follows: "He [the plaintiff] must prove by the fair weight of evidence that he was not negligent himself, in other words, that no negligent conduct on his part contributed to his injury, and in that you have to take into account what he was expected to do, what opportunities he had of observing, the position he occupied, viz. that of a fireman. There seems to be some evidence that to some extent he was called upon to look out for signals and switches, and if so, to what extent,

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duty to look out for signals was similar to that of an invited guest riding in a friend's carriage. If this had been seasonably objected to, and the judge had declined to change it, we think the defendant would have had ground of objection. But the objection taken to the instructions given was only a general one, "in so far as they conflict with the instructions prayed for." We are of opinion that the attention of the judge should have been called to this portion of the charge, if the defendant wished to except to it. *Commonwealth* v. *Walsh*, 162 Mass. 242.

2. The fourth count of the declaration charges that the injury occurred by reason of the negligence of some person in the defendant's employ, acting as superintendent, with the authority and consent of the defendant, in the absence of the defendant's superintendent. The plaintiff filed a specification that he was injured by reason of the negligence of some person in the service of the defendant acting as superintendent whose name is unknown, who had, at the time, the charge and control of the tracks, switches, tools, and other instrumentalities at the point and upon the division of the defendant's road where the plaintiff was injured.

Under this count and specification, the plaintiff contends that Cone, the station agent at Chester, who had charge of the running of trains over the single track, was a superintendent and was negligent. While there was not a literal compliance with Rules 92–99,* there was a substantial compliance, and we

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and what opportunities, did he have to see? I suppose he comes, in this matter, under the principle that is ordinarily applied when one man is riding with another. I suppose, if I am riding with a friend of mine in the country in my friend's team, and we approach a railroad crossing, for instance, and I have observed a train coming, my friend is busy talking with me and his attention is preoccupied and he does not see it, and I have reasonable ground to know he does not see it, I suppose it is my duty, in the exercise of reasonable and ordinary care, to call his attention to it and give him warning, and if I allow him to drive on the track without doing anything of that kind, I myself knowing that this train is drawing near and that we are liable to be struck, that it may be found that my conduct is negligent and I may be prevented from recovering for any damage, although I am not driving."

* These rules were entitled "Rules for single track by telegraph." Rule 92 was as follows: "No person authorized to make single track shall despatch trains over it without having first secured the safety of the trains in the following manner." The succeeding rules contain the particulars of the course to be pursued by the station agent and the train despatcher.

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do not think that there can be said to be any negligence on his part which contributed to the accident. He had given an order to hold all east-bound trains at Washington, west of the cross-over, for orders from him. This order was sent and was obeyed. There was, therefore, a clear track to Washington. He gave an order in writing to the engineer, which allowed him to go only to Washington.

Nor do we think there was anything to show that Cone was bound to give minute directions to the person in charge of the switch at Washington, as to the setting of the switch. He might fairly assume, under the general orders given, that the switch would be rightly set, or, if not, that the signal would indicate that fact to the trainmen. *Burns* v. *Washburn*, 160 Mass. 457. *Perry* v. *Old Colony Railroad*, 164 Mass. 296. We are of opinion, therefore, that the court should have given the fifth request for a ruling, which was that under the fourth count the plaintiff could not recover.

3. The fifth count relies upon the negligence of Chapin, the engineer in charge of the engine on which the plaintiff was serving as fireman. The sixth and seventeenth requests relate to this count. The sixth request is: "Upon the whole evidence and notice in the case, the plaintiff cannot recover upon the fifth count of his declaration." The seventeenth request is: "There is no sufficient evidence that Chapin was negligent, and there can be no recovery on that ground." Under the fifth count the specification is: "The plaintiff says he was injured by reason of the negligence of one Chapin, who had the charge or control of a certain engine supposed to be numbered 130, in running said engine and train upon the track on which said snowplough was without seeing whether or not a proper signal was out showing that said track was in a safe condition for him to proceed."

The defendant contends that under this specification the only negligence charged is in not seeing that signal, and that it was impossible to see it on account of the weather. The evidence certainly is that at times a signal could not be seen; and the plaintiff testified that he could not see anything when he looked out. But the specification is broader than this. The gist of it is the continuing to run upon the south track without seeing

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whether or not a proper signal was out, showing that track to be safe. There was evidence in the case which showed that it was the duty of the engineer to stop when he could not see how the signal was. The engineer admitted this to be so, and further admitted that he did not look for the signal which would show him the condition of the cross-over switches, but was looking for the switches on the cross-over track. We are of opinion that the jury might well have found that he was negligent. The sixth and seventeenth requests were, therefore, rightly refused.

4. The seventh and eighteenth requests are to the effect that the plaintiff is not entitled to recover upon the sixth count, which proceeds upon the ground that the accident was caused by some person in the defendant's employ, who at the time had charge of a certain train upon a railroad belonging to the defendant. The specification under this count refers to the negligence of some person to the plaintiff unknown, who had the charge or control of the train upon which the plaintiff was at work, in allowing the train to be run upon the track without seeing that the way was clear and safe to proceed, and without warning the plaintiff that it was not; also the negligence of the telegraph operator or station agent at Washington in not notifying the tower man, or the man in charge or control of the signals at Washington, that a train was approaching upon the track upon which the plaintiff's train was; in not notifying the plaintiff that a certain snowplough was on the track upon which the plaintiff's train was, and in not seeing that a certain switch was properly set; and also the negligence of the tower man at Washington in not properly setting the signal showing that said track was not clear, and in not seeing that the switch was properly set.

The language of the statute is: "By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad." The question of the meaning of the words "charge or control" was discussed in *Caron* v. *Boston & Albany Railroad*, 164 Mass. 523.

As we have already stated, we find no evidence of negligence on the part of Cone. As to Chapin, we have also said that

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there was evidence of negligence. That an engineer is a person in charge of a train, see *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 534. As to Simmons, the station agent at Washington, and Cheeseman, the tower man in charge of the track, it is contended that they were in charge or control of the train because they had charge of the switches. But the language of the statute seems to us clearly to show that a person having control of a switch is not a person in charge or control of a train. The court, therefore, should have given, in part, the instruction requested.

5. The eighth request for instruction was that the plaintiff could not recover upon the seventh count. This count charges negligence of some person in the service of the defendant who had the charge or control of a switch upon the defendant's railroad. The specification under this count is as follows: "The plaintiff says that he was injured by reason of the negligence of some person in charge or control of a certain switch, in not notifying the plaintiff or the person who had the charge or control of the train upon which the plaintiff was at work, that said switch was not properly set to cross over on to the other track."

The evidence shows that Cheeseman, after train No. 7 passed from the south track to the north track, changed the switch so that a train going to the westward would not cross over to the north track, but would continue on the south track, and there was also evidence that this was negligence on his part. But the act of changing the switch showed a signal that a train could not cross over. The judge allowed the jury to find Cheeseman to be guilty of negligence because he did not leave the switch as it was, and apparently overlooked the ground set forth in the specification. We are of opinion that the eighth request should have been given.

6. The eighth count charges negligence on the part of some one having charge or control of a signal. The specification is as follows: "The plaintiff says that he was injured by reason of the negligence of some person in the service of the defendant, whose name is to the plaintiff unknown, who had the charge or control of a certain signal upon the defendant's road, in not warning the plaintiff or those in charge or control of the train in which the plaintiff was at work, that the track in front of

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said train was unsafe and improper for them to proceed, said signal being the signal at said Washington station."

The question arising under this count we have already considered in passing upon the seventh count; and the judge should have ruled, in accordance with the ninth request, that the plaintiff could not recover upon this count.

7. The nineteenth request for instructions is: "There can be no recovery by reason of any negligence on the part of the station agent at Washington station." The only count on which it is sought to charge him is the sixth count, as a person in charge or control of a train. But we find nothing in the evidence to show that he was in charge or control of this train. His duty appears from the evidence to have been to transmit Cone's orders to the men in charge of the trains as they arrived at the station. There is nothing to show that he gave any orders or assumed any control. We are of opinion that the instruction requested should have been given.

8. The remaining question is whether the rules of the road were properly admissible in evidence. The objection taken to their admission was a general one, and the only ground now urged by the defendant is that the rules were issued in 1877, and that one of them was inapplicable to the condition of things as they existed on the day of the accident. No such objection was raised in the court below, and if any particular rule was inapplicable, the attention of the presiding judge should have been called to the fact. We are, therefore, of opinion that the defendant has no ground of exception to the admission of the rules.

As the verdict in the case was a general one, it is impossible to determine upon which count it was returned, and as the defendant was entitled to have some of the requests granted, it is entitled to a new trial. *Lynch* v. *Allyn*, 160 Mass. 248.

Exceptions sustained.

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SOPHIE C. ROGERS & another *vs.* LORING W. BARNES.

Suffolk. November 20, 1896. — September 13, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Mortgage — Wrongful Execution of Power of Sale — Action — Pleading — Damages.

An action for the wrongful execution of a power of sale in a mortgage of land is transitory.

The allegation in a declaration in an action for the wrongful execution of a power of sale in a mortgage of land, that the person to whom the defendant conveyed the premises was a purchaser in good faith, if material, is material only on the question of damages.

A mortgagee of land, when there has been no default or breach of the conditions of the mortgage, cannot sell the land under the usual power of sale contained in a mortgage, so as to pass a good title even to a *bona fide* purchaser for value, or to any subsequent purchaser from him.

An action may be maintained by a mortgagor of land against the mortgagee for the wrongful execution of a power of sale in the mortgage, whether a subsequent purchaser from the purchaser at the sale took a good absolute title or not; and the plaintiff, if he so elects, may recover full damages of the defendant, whether he can or cannot redeem the premises from such purchaser. ALLEN, HOLMES, & KNOWLTON, JJ., dissenting.

TORT, for the wrongful execution of a power of sale in a mortgage of land in Lexington, and for trespass thereon, with a count in contract. In the Superior Court, a demurrer to the declaration was overruled as to the first count, and sustained as to the third count; and the defendant appealed to this court. At the trial on the first count, before *Gaskill*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in November, 1896, and afterwards was submitted on briefs to all the justices.

M. S. Case, for the defendant.

W. H. Baker, for the plaintiffs.

FIELD, C. J. The plaintiffs' declaration contained three counts. The substance of the first count, which is in tort, is that the plaintiffs made a mortgage to the defendant, dated March 2, 1893, of a parcel of land to secure the payment of

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$1,200 in one year from said date, with interest thereon payable semiannually; that there was no default in the performance of the conditions of the mortgage, but that on October 16, 1893, the defendant sold the mortgaged premises at public auction for an alleged breach of condition, and conveyed them to some person to the plaintiffs unknown, after occupying them a long time for his own use, whereby the plaintiffs have been greatly damaged, and have lost their said premises.

It is unnecessary to describe the second and third counts, because it is conceded that the second is out of the case in some manner not disclosed by the papers before us, and the demurrer was sustained as to the third count. The demurrer was overruled as to the first count, and the defendant appealed. The case was afterwards tried on the first count.

On the appeal from the order overruling the demurrer as to the first count, the defendant contends that the cause of action there stated is local, and that the count is defective in not alleging good faith on the part of the purchaser of the premises from the defendant. The land mortgaged was in the county of Middlesex, and the action was brought in the county of Suffolk. We think that the gist of the cause of action alleged in the first count is the wrongful execution of the power of sale contained in the mortgage, there having been at that time in fact no breach of the conditions of the mortgage. Under the power of sale contained in the mortgage it was not necessary for the defendant to enter upon the premises before executing the power, although it is provided in the mortgage that the sale must be on or near the granted premises. The cause of action alleged does not arise from any injury to the real property, but from misconduct in executing a power of sale. We think that the action is transitory.

The objection that it is not alleged in the count that the person to whom the defendant conveyed the premises was a purchaser in good faith, was not specifically pointed out in the demurrer, and if such an allegation is material, we think that it is material only on the question of damages.

The exceptions recite as follows: "It appeared that on the 16th day of October, 1893, the defendant made an entry on the premises for purposes of foreclosure, and attempted on the

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same day to execute the power of sale. It was not disputed that at this time there was no breach of the conditions of the mortgage by the mortgagor. It also appeared that, so far as the records showed, the foreclosure was apparently proper in form. It also appeared that the property was purchased at the sale by Hammond Reed, and afterwards conveyed by said Reed to the defendant; that the purchase by said Reed was on behalf of the defendant. It also appeared that on September 3, 1894, the defendant sold and conveyed the property to one Thomas Rice by warranty deed, which deed was recorded on September 10, 1894. All of the above mentioned conveyances were duly recorded, together with the power of sale, foreclosure deed, and affidavit, as required by law."

The defendant requested the following instructions to the jury. "First. This action cannot be maintained, for the reason that the attempt to foreclose a mortgage of real estate, when there has been no breach of its terms, is absolutely void, and no damages can result therefrom. Secondly. No subsequent act of either party can make a foreclosure of a mortgage of real estate, which foreclosure is void at its inception, valid. Thirdly. A recovery in an action on the case, founded upon the attempt to foreclose a real estate mortgage when there was no breach of its terms, will not have the effect to make the attempted foreclosure valid, or the title conveyed thereby good."

These instructions the court declined to give, except so far as they were embodied in the charge to the jury. In the charge to the jury the court said: "This action is brought by two people, who had title and interest in certain real estate owned by one of them, the title to which was in one of them, the other being the husband of that person. A mortgage had been given by the plaintiffs to the defendant for $1,200. By the terms of that mortgage the interest upon the principal sum was to be paid semiannually. The mortgage was given on March 2, 1893. It appears that the last payment or advance of the $1,200 to the plaintiffs was made by the defendant shortly after August 14, 1893, at which time the total amount advanced under the $1,200 mortgage was $1,128. It is admitted that $36 of the difference between that and $1,200 was detained and retained as interest for the first six months, and that the balance, $36, was retained for

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the payment of a commission. . . . It being admitted now that there was no breach of any of the conditions of that mortgage at the time of the pretended sale, the sale operated to convey no title under it. It was an absolute nullity, as if nothing had taken place. If it remains there, and that is all there is to it, then the only damage which the plaintiff has suffered is a nominal damage. But if you are satisfied that prior to the commencement of this action the property had been conveyed by the defendant to one Rice, without any knowledge upon the part of Rice or notice to Rice of this unlawful act of the defendant, and that Rice bought it for value, then that would operate as conveying a good title to Rice; so that the plaintiff would have no means of getting himself back into possession of that property, it having gone into the possession by that conveyance of some one who purchased it for value, in good faith, and without notice of the unlawful act by which the record title of that property came into the defendant. The obligation upon the mortgagee is to deal with the utmost good faith with a mortgagor. If you are satisfied that this defendant knew, or ought to have known, that there was no breach of the condition of that mortgage at the time specified when he foreclosed, or attempted to, — took the foreclosure proceedings, — and that subsequently, before this action was brought, title had been conveyed to an innocent purchaser for value without notice, then this action can be maintained for more than nominal damages, if you find more to exist." The jury returned a verdict for $1,108.87.

There seems to be no doubt that an action like this can be maintained if, in consequence of the sale, the absolute title to the premises has passed to Rice. *Fenton* v. *Torrey*, 133 Mass. 138. *Bennett* v. *Bailey*, 150 Mass. 257. *Sherwood* v. *Saxton*, 63 Mo. 78, 83. Even if Rice has not acquired an absolute title as against the plaintiff, but should be held on the facts found in this case to be only an assignee of the mortgage, still the sale and the subsequent deeds, we think, have done some injury to the plaintiffs. They constitute a cloud upon the title of the plaintiffs to an equity of redemption in the premises, which cannot be removed without some expense to the plaintiffs, and the damages might be more than nominal.

When the sale under the power was made, it was apparent

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that there might have been a breach of the conditions of the mortgage, because more than six months had expired from the date of the mortgage, and the first payment of interest had become payable. Whether it had been paid or not was a fact which the record in the registry of deeds would not disclose. The exceptions recite that it appeared that the records "showed the foreclosure was apparently proper in form," which means, we suppose, that within thirty days of the sale a copy of the notice of the sale and the affidavit of the person selling were duly recorded in the registry of deeds, pursuant to Pub. Sts. c. 181, § 18, and that by the affidavit it appeared that the power of sale had been duly executed. By this section of the statute a duly certified copy of the record thereof "shall be admitted as evidence that the power of sale was duly executed." By the record the title conveyed to Rice appears to be a good absolute title. The defendant contends that as in fact there was no breach of the conditions of the mortgage when the foreclosure sale was made, it was void, and that the conveyances at most operated only as an assignment of the mortgage, and that the plaintiffs have the same right to redeem the land from the mortgage as they ever had, because the copy of the record of the notice of sale and of the affidavit is only evidence that the power of sale was duly executed, but not conclusive evidence.

The difficult question in this case is that of damages. It was a condition precedent to the exercise of the power of sale that there should be "any default in the performance or observance" of the conditions of the mortgage, and as there was in fact no default, the sale was unauthorized. As between the mortgagor and the mortgagee, the sale would be declared void. So long as the title to the land remained in the defendant, the plaintiffs undoubtedly could have redeemed it from the mortgage. But Rice in effect has been found by the jury to have been a purchaser for value without notice of any unlawfulness in the sale, and the jury have assessed the damages on the theory that the plaintiffs by the acts of the defendant have lost all title or interest in the premises. The law goes a great way in protecting the title of a purchaser for value without notice or knowledge of any defect in the power of the vendor to sell, and his title is not to be affected by mere irregularities in executing a power of sale con-

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tained in a mortgage, of which irregularities he has no knowledge, actual or constructive. *Burns* v. *Thayer*, 115 Mass. 89. *Dexter* v. *Shepard*, 117 Mass. 480. *Thompson* v. *Heywood*, 129 Mass. 401. *Stevenson* v. *Hano*, 148 Mass. 616. *Silva* v. *Turner*, 166 Mass. 407, 413. In *Montague* v. *Dawes*, 12 Allen, 397, it was held that a tender duly made by the mortgagor, but not followed by a bill to redeem, did not affect the title to a *bona fide* purchaser claiming title by mesne conveyances from the purchaser at a sale under the power in the mortgage. Still, the general rule is that conditions precedent to the execution of a power of sale must be strictly complied with. *Smith* v. *Provin*, 4 Allen, 516. *Roarty* v. *Mitchell*, 7 Gray, 243. *Foster* v. *Boston*, 133 Mass. 143. *Dearnaley* v. *Chase*, 136 Mass. 288. See, for cases cited by the plaintiffs, *Jackson* v. *Henry*, 10 Johns. 185; *Gibbons* v. *Hoag*, 95 Ill. 45; *Warner* v. *Blakeman*, 36 Barb. 501; *Hoit* v. *Russell*, 56 N. H. 559; *Merchant* v. *Woods*, 27 Minn. 396; *Gunnell* v. *Cockerill*, 79 Ill. 79; and for cases cited by the defendant, *Shippen* v. *Whittier*, 117 Ill. 282; *Pratt* v. *Tinkcom*, 21 Minn. 142; *Williams* v. *Peyton*, 4 Wheat. 77.

On principle we think it must be considered that in this Commonwealth a mortgagee, when there has been no default or breach of the conditions of the mortgage, cannot sell the land mortgaged under the usual power of sale contained in a mortgage so as to pass a good title even to a *bona fide* purchaser for value, or to any subsequent purchaser from him. The mortgagor undoubtedly, by laches or by acts amounting to an estoppel, may be prevented from contesting the validity of such a title. He may ratify the sale and the deed given under the power of sale by parol. *McIntyre* v. *Park*, 11 Gray, 102. The argument certainly is strong that a *bona fide* purchaser for value ought to be protected in his title by what appears on the record in the registry of deeds, in the absence of knowledge to the contrary; but the argument is, we think, stronger that a mortgagor should not be deprived, without his knowledge and assent, of his equity of redemption by a sale under a power contained in a mortgage which authorizes a sale only in case of a default, when there has been no default. A majority of the court, however, do not think that the decision of this case necessarily depends upon the question whether Rice took a good absolute title or not. The case

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of the plaintiffs, taken most favorably for the defendant, somewhat resembles that of a conversion of personal property where the owner can sue the wrongdoer and recover the full value of the property converted, even though the title to the property did not pass by the conversion, or can recover the property itself, or is like the case of a misappropriation or unauthorized investment or sale of trust property, where the *cestui que trust* can compel the trustee to account for the full value of the property, even although the property or some of it can be recovered. In none of these cases can the plaintiff recover both the property and full damages for the conversion or misappropriation of it, but if he recover judgment for full damages, and they are paid, the title to the property passes to the wrongdoer and his grantees. A mortgagee in executing the power of sale contained in a mortgage is in a sense a trustee for the mortgagor. In the present case a majority of the court think that the plaintiffs, if they so elect, can recover full damages of the defendant, whether they can or cannot redeem the premises from Rice. If the damages recovered are paid, the effect is to make Rice's title good as against the plaintiffs. The defendant for the purpose of mitigating damages cannot be heard to say that he has not done what he intended to do, and what on the face of the transaction he appears to have done, when what he has done will become valid if he pays the damages. In the view of a majority of the court, there is no error of law in the exceptions prejudicial to the defendant. *Exceptions overruled.*

Justices Allen, Holmes, and Knowlton are unable to agree with the decision of the court. They had not been aware that the form of recovery for the conversion of chattels had been applied to real estate, or that if land is wrongfully withdrawn from its owner there is any remedy at common law except to recover the land. They had supposed, furthermore, that when a deed purporting to execute such a power as this in fact was outside the terms of the power and was wholly void, it could not be resuscitated at a later moment by a parol ratification on the part of the donor, and more specifically that the doctrine of *Miller* v. *Hyde*, 161 Mass. 472, never had been applied to real estate. Furthermore, they doubt whether, if the mortgage sale

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is ratified, the plaintiffs can have any claim except that the price actually received shall be accounted for. But in their opinion these questions are not open. The first count of the declaration insists throughout that the attempted sale was unlawful. It does not in any way purport to accept and ratify it. It expresses an erroneous opinion, it is true, that a subsequent second sale to a third person conveys a good title, whether the plaintiffs assent or not, which is not the law. But the gravamen of the count is falsely alleging the conditions to exist which warrant a sale of the plaintiffs' property under the mortgage, and unlawfully purporting to sell it, and by these acts slandering the plaintiffs' title. Substantial damages properly could be allowed for such slander, but the instruction that, if the property had been sold again to a *bona fide* purchaser, this would give a good title, inevitably led to a verdict for the value of the property, and this constituted a mistrial.

ALFRED COOK & others *vs.* SOLOMON N. ADAMS.

Middlesex. March 15, 1897. — September 18, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, & LATHROP, JJ.

Statute — Written Consent of Husband to Wife's Will — Ante-nuptial Agreement.

There is no provision of statute which requires the consent of a husband to his wife's will to be written thereon, and such consent may be shown by an ante-nuptial agreement, executed by him, although it is inartificially drawn and its meaning is not free from doubt; and it is immaterial that the agreement contained no schedule of property, and was not recorded.

BILL IN EQUITY, filed May 15, 1896, permanently to enjoin the defendant from making any claim by petition or otherwise to the real or personal estate of Mary N. Adams, his wife, except as given to him in and by her last will and testament, in which he was named as one of four residuary legatees. Hearing before *Knowlton*, J., who reserved the case for the consideration of the full court.

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H. W. Chaplin, (*A. D. Hill* with him,) for the defendant.

The agreement was, by Gen. Sts. c. 108, §§ 27, 28, void. This statute originated in St. 1845, c. 208. That act (§§ 1 and 2) provided that persons contemplating marriage might contract in writing that after the marriage the wife should continue to hold property possessed at the time of the marriage to her separate use; but that there should be annexed to the contract a schedule of the property, with a description "sufficiently clear to enable any creditor of the husband to distinguish it from all other property"; that the contract and schedule should be recorded, and, if not so recorded, should be "void."

A failure to record made the contract absolutely void. *Ingham* v. *White*, 4 Allen, 412. *Butman* v. *Porter*, 100 Mass. 337. Colt, J., in *Jenkins* v. *Holt*, 109 Mass. 261, 262. *Deshon* v. *Wood*, 148 Mass. 132, 135 *ad fin.*

That statute, in dealing with ante-nuptial contracts, dealt only with property which was the wife's before marriage; and therefore, in so far as it contemplated and dealt with any loss of rights by the husband or his creditors, it dealt only with rights which would be his at the common law, upon marriage, but for the ante-nuptial contract. Those rights were the right to her personal estate, enjoyment of her real estate during coverture, curtesy, — all were subject to execution against the husband. *Divoll* v. *Leadbetter*, 4 Pick. 220. *Gardner* v. *Hooper*, 3 Gray, 398. *Mechanics' Bank* v. *Williams*, 17 Pick. 438. Chapman, J., *Staples* v. *Brown*, 13 Allen, 64, 65.

That St. 1845, c. 208, § 2, applied to survivorship rights was decided in *Butman* v. *Porter*, 100 Mass. 337, in which the defendant, a widow, alleged invalidity of an ante-nuptial contract, for lack of record. Her grounds necessarily were, that so much of the contract as was a relinquishment by the husband of rights in her property was within St. 1845, c. 208, §§ 1, 2, and was void for lack of record; that her relinquishment of survivorship rights in his property was dependent upon his release of such rights in her property, and that his release was void for lack of record. The contention was thus raised, and the court held that a husband's relinquishment of survivorship rights in his wife's property was within St. 1845, c. 208, §§ 1, 2, and that lack of record makes a contract absolutely void.

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Butman v. *Porter* was not overruled by *Jenkins* v. *Holt*, 109 Mass. 261; for the point determined in *Butman* v. *Porter* was before the court in *Jenkins* v. *Holt* only in a secondary way.

St. 1867, c. 248, does not affect the result. The plaintiffs are not within it. The only parties as to whom a contract was, by that act, made valid without record, were "the parties . . . and their heirs and personal representatives." The plaintiffs are appointees under a power, and no one of these classes includes appointees. Appointees of a wife take title, not from her, but from her husband, the creator of the power, and *vice versa*. Validity is dependent upon both record and schedule. Record alone, without a schedule, would obviously be of no avail to satisfy the statute. A schedule, therefore, is essential to validity. St. 1867, c. 248, it will be observed, did not omit the requirement of a schedule.

F. A. Perry, also for the defendant, filed a brief.

G. P. Wardner, for the plaintiffs.

LATHROP, J. The plaintiffs are some of the devisees and legatees under the will of Mary N. Adams, who died on August 3, 1895, without issue. Her will is dated February 27, 1892, and has been duly admitted to probate. Before the filing of the bill, the defendant, who was the husband of Mary N. Adams, had petitioned the Probate Court to assign to him in fee real estate left by his wife to the amount of $5,000. He had also filed a waiver of the provisions of the will, and a claim to one half of her personal estate. See Pub. Sts. cc. 124, § 1; 135, § 3, cl. 3; and 147, § 6; Sts. 1882, c. 141, § 1; 1884, c. 301; 1885, c. 255; 1887, c. 290.

While under our statutes a will made by a married woman is valid, although her husband has not given his consent thereto, yet it is provided that such will shall not, without his written consent, deprive him of certain rights in the property left by the wife.

There is no provision of statute which requires the consent of the husband to be written upon the will. To show such consent, the plaintiffs rely upon the following ante-nuptial agreement, executed by the defendant:

"This indenture, made on the twenty-fourth day of July, A. D. eighteen hundred and sixty-seven, by Solomon N. Adams

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of Beaufort in the County of Carteret and Commonwealth of North Carolina, witnesseth: that the said Solomon N. Adams covenants and agrees with Mary N. Adams, widow, of Chelsea, in the County of Suffolk and Commonwealth of Massachusetts, that in consideration of this, that, should the said Mary N. Adams become the wife of said Solomon N. Adams, all her property real and personal which she now has or may acquire and have while such married state continues, shall be, remain, and rest in her, to her sole and separate use and control forever, without let or hindrance from the said Solomon N. Adams, that she may dispose of the same by deed, grant, bargain, sale, gift, desire, will, or otherwise, as she may desire, without the consent, let, or hindrance of the said Solomon N. Adams; this indenture is considered a consent by the said Solomon N. Adams to any disposition by the said Mary N. Adams of any and all her property, real and personal, after she shall have married the said Solomon N. Adams, and a full compliance with the Massachusetts statute in that case made and provided. See Gen. Sts. c. 108, § 3. And the said Solomon N. Adams further agrees that in case any other writing after marriage should be necessary from said Solomon N. Adams in order that the said Mary N. Adams may convey and give a valid title to any or all of said property, real and personal, he will give such writing without cost or delay."

The first question which arises is as to the construction of this agreement. It is inartificially drawn, and its meaning is not free from doubt. We are of opinion, however, that the word "will" is used in its technical sense, as meaning a testamentary instrument, and that the word "desire" is a mistake for "devise." The preceding words, "deed, grant, bargain, sale, gift," are technical words, and there is no reason to suppose that the word "will" was used in any other sense. Construing the word "will" in this way, the subsequent language of the agreement cannot cut down what has already been consented to.

The remaining question is as to the effect to be given to the fact that the agreement contained no schedule of property and was not recorded. The law in force at the time the agreement was made is to be found in the Gen. Sts. c. 108, §§ 27, 28, and the St. of 1867, c. 248. Section 27 of chapter 108 allows a con-

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tract to be made at any time before marriage by the parties thereto. Section 28 provides: "There shall be annexed to such contract a schedule of the property intended to be affected thereby, containing a sufficiently clear description of the property to enable any creditor of the husband or wife to distinguish it from all other property." There is a further provision that the contract and schedule shall be recorded within a certain time, and "if not so recorded the contract shall be void."

The St. of 1867, c. 248, which took effect on May 18 of that year, provided that no marriage contract should be invalid for failure to record the same, as provided in the Gen. Sts. c. 108, § 28, "as between the parties thereto, and their heirs and personal representatives."

The object of the Gen. Sts. c. 108, as pointed out by Mr. Justice Colt in *Jenkins* v. *Holt*, 109 Mass. 261, 262, so far as the schedule and recording are concerned, is to prevent creditors from being defrauded. The schedule is a mere incident of the contract for the greater protection of creditors. Where creditors are not concerned, the contract is not required to be recorded, since the St. of 1867, c. 248; and we see no reason why the absence of a schedule should render the agreement void as between the parties.

We are of opinion, therefore, that the plaintiffs are entitled to a decree according to the prayer of the bill.

Decree accordingly.

WILLIAM ROTCH, administrator, *vs.* WILLIAM C. LORING & another, executors, & others.

Suffolk. December 2, 1896. — September 29, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Will — Termination of Trust — Heirs at Law — Residue — Remainder.

A testator made by will no pecuniary bequest to his wife, but gave her his city house for life and the household furniture, etc. absolutely, and his country house for life and the household furniture, etc., the property given for life to

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be disposed of at her death "as part of the residue of my estate in the manner hereinafter directed concerning the same." He directed that there be deposited with a certain corporation $100,000 for each of his three daughters, the income to be paid to each for life, and upon the decease of each the deposit to be paid over "to her children then living," and the issue of any deceased child by right of representation, and in default of any lawful issue then living of such daughter to be paid over "to my heirs at law, as part of the residue of my estate in the manner hereinafter directed concerning the same." He also directed that $100,000 be deposited with the same corporation for each of his two sons, A. and L., the income of each fund to be paid to each son during life, free from the interference of creditors and without the power of anticipation, and on his decease leaving a will to pay over the whole fund "to the children of such deceased son then living, and to the issue of any deceased child by right of representation, . . . and in default of any issue or children of such son then living" to pay over the fund "to my heirs at law, as hereinafter provided." The residuum included "all such estate, property, funds, and moneys as shall from time to time become part of the residue of my estate, under the provisions of this my will." The testator directed that the residue be divided into so many equal shares that there might be one share set aside for "each of my children then living"; and then, after the paragraphs containing the bequests of the residue, he gave one of the shares "to each of my sons living at the time of my decease" absolutely, and also gave one share for each of his daughters living at his decease to trustees. The will also contained an obscurely worded provision as to the *cestuis que trust*. *Held*, on the death of A. leaving a will, that the $100,000 held by the corporation in trust for him during life fell into the residue, and was to be divided into five equal parts, of which one part belonged to A., and was to be paid to the executors of his will, one part was to be paid to L. absolutely, and the three remaining parts were to be paid to the trustees, one part to be held in trust for each of the daughters.

BILL IN EQUITY, by the administrator with the will annexed of the estate of Benjamin S. Rotch, to obtain the instructions of the court as to the construction of the will. Hearing before *Morton*, J., who reserved the case upon the bill, answers, and an agreed statement of facts, for the consideration of the full court. The facts appear in the opinion.

T. N. Perkins, for William C. Loring and Abbott Lawrence Rotch, executors of the will of Arthur Rotch, submitted the case on a brief.

M. Storey & J. L. Thorndike, for the daughters of the testator.

F. C. Lowell, for the trustees under the will of Benjamin S. Rotch.

L. M. Stockton, for Augustus Lowell, administrator of the estate of Annie B. Rotch.

H. W. Swift, for Abbott Lawrence Rotch personally, and for the guardian *ad litem* of Thomas and Aimée Lamb.

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FIELD, C. J. This is a bill for instructions, brought by the administrator with the will annexed of the estate of Benjamin S. Rotch, who died on August 19, 1882. The bill relates to the $100,000 which was placed in the care of the Massachusetts Hospital Life Insurance Company for the benefit of Arthur Rotch, the testator's son, pursuant to the directions contained in the fourth article of the will. Arthur Rotch died testate on August 15, 1894, leaving no issue, and the executors of his will are made defendants. Of the other children of the testator who survived him, Edith, Aimée, Annie L., and Abbott Lawrence were living at the time of the filing of the bill, and are made defendants. Edith never married; Aimée has no issue; and Thomas Lamb and Aimée Lamb, the only issue of Annie L., are made defendants, and have appeared and answered by their guardian *ad litem*. The testator's wife, Annie B., survived him, but died before the death of Arthur Rotch, and the administrator of her estate is made a defendant. The trustees under the will of Benjamin S. Rotch are also made defendants. The $100,000 has been paid to the complainant by the Life Insurance Company, and the various claims made upon the complainant are stated as follows. The executors of the will of Arthur Rotch contend that whether the $100,000 goes directly to the heirs of Benjamin S. Rotch or becomes a part of the residue to be distributed under the residuary clause of his will, one fifth of it vested in Arthur Rotch, as of the time of the death of the testator, and that they as such executors are entitled to this one fifth. The administrator of the estate of Annie B. Rotch contends that the fund should be distributed among the heirs of Benjamin S. Rotch as of the time of his death, and that as such administrator he is entitled to one third of it as the distributive share of the widow of Benjamin S. Rotch. The other defendants contend that the fund should be distributed among the heirs of Benjamin S. Rotch who were living when Arthur Rotch died, the three daughters contending that the fund does not fall into the residue, but that their shares should be paid to them outright, and the trustees under the will of Benjamin S. Rotch contending that the fund falls into the residue, and that the shares of the daughters should be paid to the trustees.

The general scheme of the will is as follows. The testator,

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Benjamin S. Rotch, makes no pecuniary bequest to his wife, and he gives in the will the following reason therefor: "As my beloved wife Annie is possessed of an estate sufficient for all her wants, I do not deem it necessary to make her any pecuniary bequest." He gives to her, in the second article of the will, for her life, or so long as she shall desire to occupy it, his mansion house in Commonwealth Avenue, Boston, and substantially all the household furniture and everything pertaining to the household establishment, to be her absolute property. He also gives to her for her life, or so long as she desires to occupy it, his house and the lot of land surrounding it, in Milton, Massachusetts, with its appurtenances and the household furniture contained in it. He directs that these provisions for the benefit of his wife are to be in lieu of dower, and provides that at and upon the decease of his wife the property given her for life "is to be disposed of as part of the residue of my estate in the manner hereinafter directed concerning the same"

In the third article of the will the testator directs his executors to deposit with the Massachusetts Hospital Life Insurance Company $100,000 for each of his daughters, Edith, Aimée, and Annie L., each deposit to be held by the company during the life of the daughter for whose benefit it is deposited, the income to be paid annually to the daughter during her natural life, for her sole and separate use, without the interference of any husband, and without being subject to his debts or control. Then follows this provision: "Upon the decease of each of my said daughters, the deposit made as aforesaid for her benefit shall be transferred, conveyed, assigned, and paid over to her children then living, and the issue of any deceased child by right of representation; to have and to hold the same to them and their respective heirs, executors, administrators, and assigns forever. And, in default of any lawful issue then living of such daughter, then the same shall be conveyed, assigned, transferred, and paid over to my heirs at law, as part of the residue of my estate in the manner hereinafter directed concerning the same."

In the fourth article of the will the testator directs that $100,000 be deposited with the same Life Insurance Company for each of his two sons, Arthur Rotch and Abbott Lawrence Rotch, to be held by the company "for the benefit of each son

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respectively, upon the following trusts, namely," etc. Then follows a provision for the accumulation of the income of the trust fund for his younger son, if he should be a minor at the time of the deposit for his benefit. After the younger son attains full age, the provision for him is the same as that for his older brother, and is substantially as follows. The income of each fund is to be paid to each son during his life annually, for his own use and benefit, free from the control or interference of creditors and from liability in any way for his debts, and without the power of anticipation "by any sale, pledge, or assignment thereof." There is a provision "at and after the decease of each son," in the event that the son "shall have left no will, and shall have left a widow," for the benefit of the widow of such son, which need not be noticed, as Arthur Rotch died testate, and the agreed facts show that his widow is not within the provision. If each son "so dying shall leave a will," etc., then the direction is, "in trust to convey, assign, transfer, and pay over the whole of the said trust fund held for the benefit of such son so dying to the children of such deceased son then living, and to the issue of any deceased child by right of representation; to hold to them, their heirs, executors, administrators, and assigns forever. And in default of any issue or children of such son then living, then in trust to convey, assign, transfer, and pay over the whole of the said trust fund, or the residue, as the case may be, after deducting therefrom such amount, if any, as may be payable to his widow as aforesaid, to my heirs at law, as hereinafter provided; to have and to hold the same to them, their respective heirs, executors, administrators, and assigns forever."

The first paragraph of the fifth or residuary article of the will is as follows: "All the rest, residue, and remainder of the estate, real and personal, of which I may die seised and possessed, or to which I may at the time of my decease be in any way entitled, of whatsoever the same may consist or wheresoever situated, not herein otherwise disposed of, including all real estate purchased or acquired after the date of this will, and also all such estate, property, funds, and moneys as shall from time to time become part of the residue of my estate, under the provisions of this my will, I give, devise, and bequeath in the manner following," etc.

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Before considering the disposition made by the will of this residue, it may be said that the will abounds in superfluous words, and that the style generally is diffuse. It seems to us manifest that the disposition to be made of the trust fund held for the benefit of each daughter, in the event of such daughter dying and leaving no issue surviving her, was meant to be the same as that of the disposition to be made of the trust fund held for the benefit of each son, in the event of such son dying leaving a will and no issue surviving him, although the language of the will is not precisely the same in both cases. In one case, the direction is that the fund shall be "paid over to my heirs at law, as part of the residue of my estate in the manner hereinafter directed concerning the same," and in the other, the direction is to "pay over the whole of the said trust fund . . . to my heirs at law as hereinafter provided; to have and to hold the same to them, their respective heirs, executors, administrators, and assigns forever." We think that the testator had these provisions in mind when, in the beginning of the fifth article, he included in the residue of his estate "all such estate, property, funds, and moneys as shall from time to time become part of the residue of my estate, under the provisions of this my will," etc.

The second paragraph of the fifth article, which immediately follows the first paragraph we have quoted, is as follows: "I direct that the said residue of my property and estate shall be divided into so many equal shares or parts that there may be one share set apart and appropriated for the benefit of each of my children then living, and one share or part for the benefit of the lawful issue then living of every deceased child of mine; such issue of every deceased child taking by right of representation, in the manner hereinafter provided, the share or part of which, which his, her, or their parent, if then living, would have been entitled." Then follow the paragraphs containing the bequests and devises of the residue, the first clause of which is as follows: "And I hereby give, devise, and bequeath one of the said shares or parts of the said residue of my estate to be set apart as aforesaid, to each of my sons living at the time of my decease to have and to hold the same to him or them, such male issue, as the case may be, and his or their respective heirs, executors, administrators, and assigns forever."

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The first clause of the paragraph containing the bequests and devises for the benefit of the daughters begins as follows: "I give, devise, and bequeath the share of each of my daughters living at my decease, and the share of each and every of the female issue living at my decease of any child of mine who may die before me, to my trustees," etc.

It is important to determine to what period of time the phrase "then living" relates; it occurs three times in the second paragraph of the fifth article. In the preceding paragraph of this article the only period of time referred to is "the time of my decease," and this is the time referred to in the paragraphs immediately following the second paragraph. The second paragraph seems to us to mean that the residue of the property shall be divided into equal shares, and one share shall be set apart and appropriated for the benefit of each of the children of the testator living at the time of his decease, and one share for the lawful issue living at the time of his decease of each of his children who may have died before his decease, such issue taking their parent's share by right of representation. It does not appear that any of the children of the testator died before his decease, leaving issue. This residue, then, is to be divided into five equal shares, one share to be set apart for each of his five children.

The testator proceeds in the first of the following paragraphs to give absolutely one share to each of his sons living at the time of his decease, with certain provisions concerning the male issue of any deceased child, which need not be particularly noticed. In the next paragraph he gives one share for each of his daughters living at his decease to trustees, with certain provisions concerning the female issue of any child who may die before his decease. The trust for each daughter is in substance to pay over the net income to the daughter during her natural life, for her sole and separate use, and at and upon her decease to convey the trust property held for the benefit of such daughter to her lawful issue then living in equal parts to her children, and to the issue of any deceased child taking by right of representation, and in default of any issue then living of such daughter, then to the testator's heirs at law. Concerning the male and female issue surviving the testator of children who deceased

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before him, there are provisions that if any male issue shall at the time of the testator's decease be under the age of twenty-two years, his share shall be held in trust until he reaches the age of twenty-two years, and that then the share shall be conveyed to him absolutely; if such issue die under the age of twenty-two, leaving lawful issue, then the share is to be conveyed to such issue; but if he leave no lawful issue, then it shall be conveyed absolutely to his brothers and sisters, if any, but if there are no brothers and sisters, then to the testator's heirs at law. Upon the death of any female issue surviving the testator of any of his children who deceased before him there are somewhat similar directions. The paragraph ends with the provision that, if any child of the testator's daughters shall at the decease of such daughter be under age, the share of such child shall be held in trust until full age, the income to be paid to the guardian of the child until it reaches full age, when the share shall be conveyed absolutely to the child; but if any such child shall die under age, leaving no lawful issue living, then the share shall be paid "to his or her brothers and sisters, if any, but otherwise to my heirs at law."

After giving to his trustees ample powers for the filling of any vacancies in the trust, the testator proceeds as follows: "It is my will that the *cestuis que trust*, to whom income is payable under this will for their respective lives, or for any less period, are not to have or exercise any right or power of disposing of their respective interests, title, or property in their respective trust estates by will or testamentary appointment, nor to sell, pledge, assign, or transfer the same; it being my intention that said annuitants or *cestuis que trust* shall take an interest for life or term of years, as the case may be, with remainder to their or my heirs respectively, as the case may be." The whole meaning of this clause is not entirely clear. That a *cestui que trust* should not dispose of income payable to him only during his life by "will or testamentary appointment," hardly requires a prohibition; that he should not dispose of it during his life is in accordance with the trusts created for the sons by the fourth article of the will. It is doubtful if by this clause the testator intended to affect the disposition to be made of the remainders after the termination of the trust estates which were to go to

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the heirs of the *cestuis que trust* or to "my heirs respectively, as the case may be." At all events, the meaning of this clause seems to us too uncertain to control the other provisions of the will.

We are of opinion that the provision in the third article of the will, that on the decease of any one of his surviving daughters leaving at the time of her death no lawful issue then living, the $100,000 held in trust for her shall be "paid over to my heirs at law as part of the residue of my estate, in the manner hereinafter directed concerning the same," means that such share shall be paid in to the residue to be distributed among the testator's heirs at law as a part of the residue; and that the same construction should be given to the last clause of the fourth article of the will, whereby on the decease of each of his sons leaving no issue then living, (the provision concerning the son's widow having become operative,) the trust fund of $100,000 held for each son is to be paid over "to my heirs at law, as hereinafter provided." Immediately in the next article he makes provision for the disposition of all the remainder of his estate for the benefit of each of his children living at his decease, and for the benefit of all the issue then living of any child of his who should die before his decease. These, technically speaking, would be his heirs at law, and his only heirs at law at the time of his death. In order that there should be no doubt of what he means by the residue of his estate he expressly includes in it "all such estate, property, funds, and moneys as shall from time to time become part of the residue of my estate under the provisions of this my will." These words are not satisfied by confining them to the remainders in his mansion house in Commonwealth Avenue and in his house in Milton, in which he had given to his wife an estate for her life or so long as she desired to occupy them. If it be held that he gave to his wife only a life estate in the household furniture in the house in Milton, still this would not render necessary the broad language of the residuary clause. Besides, he had expressly provided, near the end of the second article of the will, that upon the decease of his wife the above mentioned property given to her only for life "is to be disposed of as part of the residue of my estate, in the manner hereinafter directed concerning the same." The words in the

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residuary clause, "all such estate, property, funds, and moneys as shall from time to time become part of the residue of my estate under the provisions of this my will," must, we think, be held to include the funds and money which under the third and fourth articles of the will he had in certain events directed to be paid over to his heirs at law as "a part of the residue of my estate, in the manner hereinafter directed concerning the same," or "as hereinafter provided." It is only by statute that a widow is ever strictly speaking an heir at law of her husband, and by existing statutes she is such only when he dies leaving no issue living, or no kindred, which is not this case. Pub. Sts. c. 124, § 3.

The contention of the administrator of the estate of the widow of Benjamin S. Rotch in effect is that the words "heirs at law," in the fourth article of the will, as they relate to the devolution of personal property, must be taken to mean distributees of personal estate, and that, as the widow would have been entitled to one third of the personal estate of the testator if he had died intestate, the administrator of her estate is entitled to one third of the $100,000. But as we are of opinion that the words "heirs at law" in the fourth article of the will must be held to mean heirs at law as defined in the fifth article, disposing of the residue of the estate in which no provision is made for the testator's wife, the argument in behalf of her estate becomes inapplicable.

Upon the question whether the heirs at law of the testator who take the residue are to be determined as of the time of his death or as of some subsequent time, we think that the language of the first part of the residuary clause is reasonably specific. There are certain ulterior limitations in the residuary article of the will, in certain events, to the testator's heirs at law, which we have noticed, with regard to which it is not now necessary to express any opinion, but the principal direction found in the second paragraph of the residuary article is, as we interpret it, that the residue shall be divided into equal shares, and one share shall be set apart and appropriated for the benefit of each of the children of the testator living at the time of the testator's decease; and one share for the benefit of the lawful issue living at the time of the testator's decease of any child of the testator

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who should die before his death. It is generally true that when property is given by will to one for life, with remainder to the testator's heirs at law, and the life tenant is only one of the heirs at the death of the testator, the life tenant is not excluded from taking a share of the remainder, unless there are clear expressions in the will to the contrary. See *Fargo* v. *Miller*, 150 Mass. 225. But we think it unnecessary to discuss the general doctrine here, because we regard the direction as express that the residue shall be divided into shares for each of the children of the testator living at the time of the testator's death.

The $100,000 held by the Massachusetts Hospital Life Insurance Company in trust for Arthur Rotch during his life, in the event which has happened falls into the residue of the estate of Benjamin S. Rotch, and is to be divided into five equal parts, of which one part belongs to the estate of Arthur Rotch and is to be paid to the executors of his will; one part is to be paid to Abbott Lawrence Rotch absolutely; and the three remaining parts are to be paid to the trustees, to be held in trust for the daughters Edith, Aimée, and Annie L., one part for each, according to the provisions for their benefit in the residuary article of the will. *Decree accordingly.*

OSCAR KALLECK *vs.* GARDNER G. DEERING & others.

Suffolk. November 17, 1896. — October 2, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Master and Servant — Seaman — Defective Appliance — Fellow Servant — Negligence — Action — Law and Fact.

Where a seaman is injured by the breaking of a triangle on which he was sitting and scraping a mast, in an action against the owners of the vessel for his injury, if there is some evidence that the master, who was an owner, directed the mate to make the triangle out of the boards which he afterwards used for that purpose, but which were not suitable, the plaintiff is entitled to go to the jury as against the master.

Whether there were suitable materials on board of a vessel which were intended or could have been used for the purpose of making a triangle, and which in the proper and reasonable performance of their duty the master or the mate could and should have used, was, on the evidence, a question for the jury.

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TORT, against the owners of a vessel, for personal injuries occasioned to the plaintiff by the breaking of a triangle on which he was sitting and scraping a mast. After the former decision, reported 161 Mass. 469, the case was tried in the Superior Court, before *Hammond*, J., who ruled that the plaintiff could not maintain the action, and directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. M. Browne, for the plaintiff.

C. T. Russell, for the defendants.

FIELD, C. J. In this case as reported in 161 Mass. 469, the court, for the purpose of determining the questions of law then before it, assumed "that the defendants did their duty in furnishing materials for the construction of the triangle, that the mate was in control of the vessel at the time, and that the cause of the plaintiff's injury was some negligence on the mate's part in constructing the triangle and in ordering the plaintiff to use it"; and it held that the mate was a fellow servant with the plaintiff, and that the defendants as owners of the vessel were not responsible to the plaintiff for the consequences of the mate's negligence, and the verdict for the plaintiff was set aside. At the new trial, the presiding justice ordered a verdict for the defendants; and the plaintiff excepted.

We have no doubt from the exceptions that there was evidence for the jury that the boards out of which the triangle was constructed by the mate were not suitable materials for that purpose. The plaintiff contends that there was also evidence for the jury that a triangle so prepared and constructed as to be ready to be lashed around a mast is a part of the equipment of a vessel which it was the duty of the defendants to furnish; or, if this is not so, that the defendants furnished no suitable materials on board the vessel out of which a proper triangle could be constructed.

Fred A. Crowell was master of the vessel at the time of the accident, and a part owner, and is one of the defendants. The exceptions recite that the following testimony was admitted against him, but not against the other defendants.

"William G. Colson, engineer on the vessel, a witness for the plaintiff, testified as follows: 'Q. Whether or not you heard

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the master give the mate any directions about making it [the triangle] and what material to make it of?' . . .

"*A.* . . . I heard the mate tell the captain that it would be a good chance while they were down there to get some hard pine to make this triangle of. The captain said he would see about it. There were some boards down in the hold that were just as good as hard pine. 'Well,' he said, 'you can make one that will do this time; perhaps I will get some hard pine while I am down here if I see any.'"

On cross-examination the witness testified that he heard this conversation about two days before they anchored in Norfolk.

We think this is some evidence that the captain directed the mate to make a triangle out of the boards which the mate afterwards used for that purpose. This direction of the captain undoubtedly must be held to have been made in his capacity as captain, and if it be true that the captain is a fellow servant with the plaintiff for whose negligence the other owners are not responsible, yet one servant is responsible for the consequences of his negligence to a fellow servant. *Osborne* v. *Morgan*, 130 Mass. 102; *S. C.* 137 Mass. 1. The plaintiff was therefore entitled to go to the jury as against this defendant.

There was some evidence that it was customary for vessels to be furnished with a triangle prepared and fit for use even on their first voyage after they are launched; that a triangle usually is made of three planks with holes in the ends, which are lashed together round a mast by means of ropes; that it can be easily made out of pieces of plank of the proper length and width, and that when once made the planks usually are stored away in the vessel for future use. To make a triangle undoubtedly is a piece of work that a ship's carpenter, or almost any intelligent seaman, can do.

The vessel in this case was a new vessel, launched in 1888. She had made a voyage to Washington and a return voyage, and at the time of the accident was on her second voyage from Boston to take a cargo of coal from Norfolk, Virginia, and had arrived at the anchorage ground off Lambert's Point, and while at anchor the mate in the absence of the master selected the materials for the triangle from some boards purchased for flooring over the ballast, constructed the triangle, and ordered the plain-

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tiff, with two others, to go aloft, get on it and scrape the foremast. They scraped the foremast, finishing the work about half past eleven o'clock. After dinner they were ordered to scrape the mainmast, and after they had been about ten minutes doing this the board of the triangle on which the plaintiff was sitting broke, and the plaintiff fell to the deck and was injured.

The exceptions recite as follows: "The evidence showed that after the accident, and on the same day, while the captain and mate were away from the vessel, the second mate, Butler, constructed a second triangle. Butler did not testify at the trial; the defendants claimed that they were unable to find him." There was evidence that this second triangle was made from planks, that it was a suitable triangle, and that the planks were put away for future use, and were afterwards used, and they were produced in court at the trial. There was evidence that these planks "were taken from the hold, those used to steady the water casks." There was a good deal of evidence that there were planks enough besides those used to steady the water casks from which a triangle could have been made, and that they were in the run of the vessel where they could easily have been found, and that the second triangle was made out of these planks shortly after the accident, on the same afternoon, but it cannot be said to be an undisputed or conceded fact that there were such planks on board the vessel that could have been used for that purpose, and there is some evidence to the contrary, particularly in the testimony of Hilton, Nelson, and the plaintiff. The planks were described by Crowell as "from 8 to 10 inches wide, and from 2 to 2½ to 3 inches in thickness," and they were of spruce. Similar planks could have been obtained at Norfolk or Lambert's Point, where the vessel was, and the suggestion is made that the planks from which the second triangle was constructed may have been obtained from Norfolk or Lambert's Point, although the captain testified that "they had no opportunity to get them from any other place [than the run of the vessel], for they had no boat to go anywhere to get them with." Whether there were planks on board the vessel which could have been got at and used, and which were suitable materials for making a triangle, we think must be considered on the evidence as in dispute. We are inclined to hold that a tri-

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angle is a thing of such simple construction that, if suitable materials were provided, it would not have been negligence on the part of the defendants not to have had a completed triangle on board as a part of the furnishings of the vessel. The burden is on the plaintiff to show that the defendants failed in their duty to provide suitable materials for making a triangle.

We are of opinion that the question whether there were suitable materials on board which were intended or could be used for this purpose, and which in the proper and reasonable performance of their duty the master or the mate could and should have so used, should have been submitted to the jury. *Twomey v. Swift*, 163 Mass. 273. *Exceptions sustained.*

FRANCIS C. WELCH, trustee, *vs.* MARIANNE BRIMMER & others.

Suffolk. December 3, 1896. — October 2, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Termination of Trust — "Heir or Heirs at Law" — Executory Devise — Estate Tail — "Then" — Dower in Estate in Fee determinable in the Event of the Tenant dying leaving no Issue surviving him — Resolve of Legislature authorizing Trustee to sell Real Estate — Waiver of Will by Widow — Power of Trustee to sell and pay Shares in Cash.

A testator gave by will the income of one full moiety of his estate, real, personal, or mixed, to his son M., and directed that so much thereof as was necessary to afford the son a suitable maintenance and a liberal education should from time to time during his minority be expended for his use, and that the excess of such income should be accumulated and added to the principal for the benefit of the son. After the son reached majority, and until he reached the age of twenty-three years, the son was to receive the whole of the income of this moiety, and upon his reaching the age of twenty-three years the provision was that the son "shall be put in possession of said moiety of my estate with the accumulation thereof, and shall hold the same to him and his heirs forever." The will then contained the following: "Provided, however, that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then, and in either of such cases, my will is that my sister E. shall have and take the said moiety of my estate and its accumulations hereinbefore given to my said son; and if the said E. shall not then be living, I give said estate, with its accumulations, to the person or persons who shall be my heir or heirs at law." By the

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second paragraph of the will the testator first gave to his sister E. an estate for her life in the other moiety of his estate, real, personal, or mixed, in case she should survive him. At her decease, or if she did not survive him, the testator provided as follows: "I give and devise her share of the moiety of my estate unto my said son M., if he shall then be living, or to his issue if he shall have deceased." Then followed the provision: "Provided, however, that this moiety of my estate shall, in case of the decease of my said son without issue, or such issue shall not attain majority, then at my said son's death, or at the decease of his issue during minority, as the case may be, go to my heir or heirs at law. And also in case my said son shall not have attained the age of twenty-three years at the time of the decease of the said E., the income of this second moiety of my estate, or any part thereof, shall be disposed of in the same manner as I have directed in respect of the income from the first moiety of my estate and its accumulations." The will was executed in 1840; the testator died in 1847, his wife having deceased in 1833; the son named in the will, who was his only child, died testate in 1896, never having had issue, and leaving a widow. The testator's sister E., who never married, died in December, 1859. At the time of the testator's death there were living eight children of his deceased sister S., some of whom were alive when the will was made. There was no reference to S. or her children in the will. *Held*, on the death of the testator's son, that he took an estate in fee in both moieties, with an executory devise over on his death without leaving issue surviving him, and that the property went to the heirs of the testator living at the time of the death of the son, as if the testator had then died intestate, those heirs being the children of S.; that whether the widow of the son was entitled to dower or its equivalent in the property must be determined hereafter, in this or some other proceeding, and that whether the trustee had power to sell the trust property and pay the shares in cash to those entitled, or must divide it specifically, could not now be determined.

BILL IN EQUITY, by the trustee under the will of Martin Brimmer, Senior, to obtain the instructions of the court as to the construction of the will, the material portions of which are as follows:

"I give to my son Martin the income and produce of one full moiety of the estate real, personal, and mixed, which shall belong to me at the time of my decease, or in or to which I shall die possessed of any title, interest, or claim, and direct that so much of such income and produce as shall be required or necessary to afford my said son suitable support and maintenance and to furnish him with a liberal education shall, from time to time during his minority, be expended for his use, and the excess of such income and produce beyond the amount of money expended for his use, as aforesaid, shall annually, or as often as convenient, be invested with the principal fund and accumulate for the benefit of my said son. From and after the time when my said son shall attain full age and until he shall arrive at the

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age of twenty-three years he shall receive the whole income and produce of said moiety of my estate with its accumulation. And upon my said son's attaining the age of twenty-three years he shall be put in possession of said moiety of my estate, with the accumulation thereof, and shall hold the same to him and his heirs forever. Provided, however, that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then, and in either of such cases, my will is that my sister Eliza Oliver shall have and take the said moiety of my estate and its accumulations hereinbefore given to my said son; and if the said Eliza O. shall not then be living, I give said estate, with its accumulations, to the person or persons who shall be my heir or heirs at law.

"And the other moiety of my estate, real, personal, and mixed, I give and devise unto my said sister, to hold to her during her natural life, and at the decease of said Eliza, or in case she shall not survive me, I give and devise her share of the moiety of my estate unto my said son Martin, if he shall then be living, or to his issue if he shall have deceased. Provided, however, that this moiety of my estate shall, in case of the decease of my said son without issue, or such issue shall not attain majority, then at my said son's death, or at the decease of his issue during minority, as the case may be, go to my heir or heirs at law. And also in case my said son shall not have attained the age of twenty-three years at the time of the decease of the said Eliza O., the income of this second moiety of my estate, or any part thereof, shall be disposed of in the same manner as I have directed in respect of the income from the first moiety of my estate and its accumulations."

The prayer of the bill was: 1. What person or persons are entitled to the principal of the trust estate, and in what proportions? 2. Whether the plaintiff has the power to sell the trust property, and to pay over the net proceeds thereof in cash to the person or persons entitled thereto, or whether he is to divide the trust property, so far as it is possible to do so, among the person or persons entitled thereto, selling only sufficient thereof to raise the cash to make the division just and equal. The case was reserved by *Field*, C. J., at the request of the parties, upon the pleadings and an agreed statement of facts, for the consideration of the full court. The facts appear in the opinion.

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The case was argued at the bar in December, 1896, and afterwards was submitted on briefs to all the justices.

S. Lincoln & P. Dexter, for the widow of Martin Brimmer, Junior, and others.

J. L. Thorndike, (*R. F. Sturgis* with him,) for Susan B. Sturgis and Charles E. Inches.

J. C. Gray, for Caroline I. Hill.

G. O. Shattuck & W. A. Munroe, for the Museum of Fine Arts, named in the will of Martin Brimmer, Junior, were permitted to file a brief.

FIELD, C. J. The will of Martin Brimmer, Senior, which we are asked to construe, was executed on July 31, 1840. He was born on June 8, 1793, and had been married, but his wife died on January 1, 1833, and he never married again. He died on or about April 25, 1847. Martin Brimmer, Junior, was his only child, and was about seventeen years old at the time of his father's death, and must have been about ten years old when the will was made. He died testate on January 14, 1896, never having had issue, and leaving a widow. The testator, Martin Brimmer, Senior, had a sister who survived him, and is the Eliza Oliver mentioned in the will. She died on December 11, 1859, and we infer that she never was married. At the time of the testator's death there were eight children of his deceased sister, Susan Inches. It is nowhere stated in the papers before us when Susan Inches died, or when her children were born; but as the will was made not quite seven years before the death of the testator, it is manifest that some of the children of Susan Inches were alive when the will was made. There is no reference to Susan Inches or to her children in the will. The son, the unmarried sister, and the children of Mrs. Inches, so far as we are informed, were the only near relations of the testator who survived him, and there is nothing before us which shows that they were not his only near relations when the will was made.

By the first paragraph of the will, the testator gave the income and produce of one full moiety of his estate, real, personal, or mixed, to his son, and directed that so much thereof as was necessary to afford the son a suitable maintenance and a liberal education should from time to time during his minority

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be expended for his use, and that the excess of such income and produce should be accumulated and added to the principal for the benefit of the son. After the son reached majority, and until he reached the age of twenty-three years, the son was to receive the whole of the income and produce of this moiety, and upon his reaching the age of twenty-three years the provision is that the son "shall be put in possession of said moiety of my estate with the accumulation thereof, and shall hold the same to him and his heirs forever." This clause made it the duty of the trustee appointed under the third paragraph of the will to put the son into possession of this moiety, with its accumulations, when he reached the age of twenty-three years. But for the proviso at the end of the first paragraph of the will, the son then would have become the absolute owner of one half of the real property in fee simple, if the testator was seised in fee simple, and the absolute owner of one half of the personal property. This proviso is as follows: "Provided, however, that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then, and in either of such cases, my will is that my sister Eliza Oliver shall have and take the said moiety of my estate and its accumulations hereinbefore given to my said son; and if the said Eliza O. shall not then be living, I give said estate, with its accumulations, to the person or persons who shall be my heir or heirs at law."

If we disregard for the present the words in the proviso "or such issue shall decease during minority," the effect of the whole paragraph is, we think, to give to the son on his reaching the age of twenty-three years, not only the possession of this moiety of the estate with its accumulations, but the ownership of it, such ownership to be determined in the event of the son thereafter dying leaving no issue surviving him with an executory devise over of the real property, and an executory bequest in the nature of an executory devise of the personal property to the sister Eliza Oliver Brimmer, if she be living at the time of the son's death, but if she be not then living, then "to the person or persons who shall be my heir or heirs at law." *Schmaunz* v. *Göss*, 132 Mass. 141. *Hooper* v. *Bradbury*, 133 Mass. 303.

By the second paragraph of the will, the testator first gave

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to his sister Eliza Oliver Brimmer an estate for her life in the other moiety of his estate, real, personal, or mixed, in case she should survive him. At her decease, or if she did not survive him, the testator provided as follows: "I give and devise her share of the moiety of my estate unto my said son Martin, if he shall then be living, or to his issue if he shall have deceased." By "her share of the moiety of my estate," the testator must have meant, not her life estate, which would have determined with her death, or if she had not survived him never would have existed, but the moiety itself out of which the life estate was given to her. Although there are no words of inheritance in this gift to the son or to his issue, yet he or they would have taken the real property in fee simple if the testator was seised in fee simple, except for the proviso contained in this paragraph. Rev. Sts. c. 62, § 4. Gen. Sts. c. 92, § 5. Pub. Sts. c. 127, § 24. This proviso is as follows: "Provided, however, that this moiety of my estate shall, in case of the decease of my said son without issue, or such issue shall not attain majority, then at my said son's death, or at the decease of his issue during minority, as the case may be, go to my heir or heirs at law. And also in case my said son shall not have attained the age of twenty-three years at the time of the decease of the said Eliza O., the income of this second moiety of my estate, or any part thereof, shall be disposed of in the same manner as I have directed in respect of the income from the first moiety of my estate and its accumulations."

We think that this proviso has substantially the same meaning as the proviso in the first paragraph. There is in it no express direction that the son, if he survived the sister of the testator and reached the age of twenty-three years, should be put into possession of this moiety, but that perhaps would follow from the fact that the son is given the ownership of this moiety if he shall be living at the time of the death of the sister. See *Hooper* v. *Bradbury*, *ubi supra*.

In the second paragraph, if the son dies before the sister, then the moiety is given to the son's issue. In the first paragraph there is no express gift to the issue of the son. Disregarding for the present the words in the proviso of the second paragraph, "or at the decease of his issue during minority," we

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think that in the event that has happened the son took the same estate in this moiety as in the other, and that his ownership was determinable on the same contingency with an executory devise or executory bequest over to the heir or heirs at law of the testator. The phrase in the second paragraph is that "in case of the decease of my said son without issue, . . . then at my said son's death" this moiety "shall . . . go to my heir or heirs at law," while the corresponding phrase in the first paragraph is, "I give said estate [said moiety of my estate], with its accumulations, to the person or persons who shall be my heir or heirs at law," but these seem to us different forms of expression of the same intention.

What is the effect of the words contained in each proviso, namely, "or at the decease of his issue during minority"? We have said that there is no express gift of anything to the issue of the son in the first paragraph. In the second paragraph the moiety is not given to the son and his issue, but on the decease of the sister of the testator to the son if then living, or to his issue if the son shall have deceased. Under this clause, if the son were then dead, his issue living at the death of the sister would have taken the property in fee. It is contended that the effect of the words in the proviso of the first paragraph, "that in case my said son shall die having no issue him surviving, or such issue shall decease during minority," and of the words in the proviso of the second paragraph, "in case of the decease of my said son without issue, or such issue shall not attain majority," is that the son took an estate tail in each moiety. *Hooper* v. *Bradbury*, *ubi supra*. The reversion or remainder in real property expectant upon the determination of an estate tail is a vested remainder, which can be devised, but a limitation of real property by way of executory devise which may possibly not take effect until after the determination of an estate tail is void as too remote. It is not, however, necessary to determine what the effect of these clauses would be if they stood alone, and if an estate tail had previously been given to the son. The second contingency contemplated has become inoperative by reason of the happening of the first contingency, and it is immaterial whether the second contingency is one on which an executory devise could or could not lawfully be limited. The

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contention is that an estate tail in the son was created by implication, but such an implication is prevented by the first contingency on which the estate given to the son is given over to other persons on the son's death without issue surviving him. It is a definite failure of issue on the death of the son which the testator had in mind, as the first contingency on which the property should go to his heirs. In the first paragraph the words are "in case my said son shall die having no issue him surviving," which undoubtedly mean a definite failure of issue. In the second paragraph the words are somewhat more general, namely, "in case of the decease of my said son without issue, . . . then at my said son's death," etc.; but it seems to us that they are sufficiently definite, and that the same construction should be given to both clauses. We are therefore of opinion that the son took an estate in fee in both moieties, with an executory devise over on his death without leaving issue surviving him. *Nightingale* v. *Burrell*, 15 Pick. 104. *Brightman* v. *Brightman*, 100 Mass. 238. *Whitcomb* v. *Taylor*, 122 Mass. 243. *Schmaunz* v. *Göss*, 132 Mass. 141.

The present case is one where at the time when the will was made the son was the sole heir presumptive, and if he survived the testator would be the sole heir. If the testator married again and had children, this would have revoked the will; but there is nothing in the will indicating that the testator contemplated the possibility of marrying again and having children. If the son died in the lifetime of the testator, the provision for the son in the will never would take effect. The testator may be presumed to have known that, in order that the provision for his son should take effect, his son must survive him, and that the son, if he survived him, would be his sole heir. When a life estate is given to one, and the remainder on his death to the heirs at law of the testator, and the life tenant is one of these heirs, this fact alone has been held not sufficient to take the case out of the general rule that the heirs at law of the testator are to be determined as of the time of his death, unless it plainly appears from other provisions of the will that the testator's intention was that they should be determined as of some other time. But when the person to whom the property is given for life is sole heir presumptive of the testator at the time when the

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will is made, and will continue to be such if he lives until the death of the testator, unless there are some changes in the testator's family relations or in the laws, which the will apparently does not contemplate, whether that person will take a remainder given on the death of the life tenant to the heirs at law of the testator, if there is nothing else in the will to determine as of what time the heirs of the testator are to be ascertained, has occasioned a good deal of doubt. The present tendency of the law in England seems to be that this fact alone would be held not enough to take the case out of the general rule. In this Commonwealth the intimations are perhaps doubtfully the other way. Some of the cases on the subject are the following: *Childs* v. *Russell*, 11 Met. 16; *Abbott* v. *Bradstreet*, 3 Allen, 587; *Minot* v. *Tappan*, 122 Mass. 535; *Dove* v. *Torr*, 128 Mass. 38; *Knowlton* v. *Sanderson*, 141 Mass. 323; *Whall* v. *Converse*, 146 Mass. 345; *Fargo* v. *Miller*, 150 Mass. 225, 229; *Wood* v. *Bullard*, 151 Mass. 324; *Proctor* v. *Clark*, 154 Mass. 45; *Peck* v. *Carlton*, 154 Mass. 231, 233; *Eager* v. *Whitney*, 163 Mass. 463; *Wason* v. *Ranney*, 167 Mass. 159; *Delaney* v. *McCormack*, 88 N. Y. 174; *Hardy* v. *Gage*, 66 N. H. 552; *Jones* v. *Colbeck*, 8 Ves. 38; *Bird* v. *Wood*, 2 Sim. & Stu. 400; *Clapton* v. *Bulmer*, 5 Myl. & Cr. 108; *Minter* v. *Wraith*, 13 Sim. 52; *Urquhart* v. *Urquhart*, 13 Sim. 613; *Say* v. *Creed*, 5 Hare, 580; *Ware* v. *Rowland*, 2 Phil. 635; *Bird* v. *Luckie*, 8 Hare, 301; *Wharton* v. *Barker*, 4 Kay & Johns. 483, 500; *Cusack* v. *Rood*, 24 W. R. 391; *Bullock* v. *Downes*, 9 H. L. 1; *Mortimore* v. *Mortimore*, 4 App. Cas. 448; *Heard* v. *Read*, *post*, 216.

When an estate in fee is given to a person who is the sole heir presumptive of the testator when the will is made, and will be the sole heir if he survives the testator, but on such person surviving the testator and dying without leaving issue surviving him, the estate is given over by way of executory devise to the heirs of the testator, it is said in argument that there is no case in England or in this country in which such person has been held to take the executory devise as heir. *Doe* v. *Frost*, 3 B. & Ald. 546. See *Lees* v. *Massey*, 3 DeG., F. & J. 113; *Sears* v. *Russell*, 8 Gray, 86. It is argued that it is absurd to suppose from such indefinite language that a testator intended to give to an only child — a son, for example — real estate in fee if he sur-

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vive the testator, and then, if the son die leaving no issue surviving him, to devest him of it in order to give it back to him in fee under the designation of heir or heirs of the testator. Such an executory devise is necessarily contingent until the death of the son leaving no issue surviving him, because until the son dies it never can be known with legal certainty whether or not at his death he will leave issue surviving him. This contingency, it is argued, distinguishes such executory devises from remainders, which can be held to vest in right as of the death of the testator. A testator can provide that by such an executory devise the property shall pass to his heirs as of the time of his death, or to his heirs as of the time of the death of the first devisee; but the nature of an executory devise, and the fact that the first estate is a fee, furnish a somewhat stronger reason for holding that the heirs are to be determined as of the time of the death of the first taker, than when the first taker has only a life estate and the devise is of a remainder.

The repeated use by the testator of the word "shall" in the proviso of the first paragraph, and the concluding clause of it, that, "if the said Eliza O. shall not then be living, I give said estate, with its accumulations, to the person or persons who shall be my heir or heirs at law," in which the word "then" relates to the time of the death of the son, tend to confirm the conclusion that the testator must have intended his heir or heirs living at the time of the death of his son. We attach slight significance to the use of the word "heir," as well as "heirs." For these reasons a majority of the court are of opinion that the heirs intended by the testator are the issue of Susan Inches, living at the time of the death of Martin Brimmer, Junior, who would have taken the real estate of the testator if he had then died intestate.

Is the widow of Martin Brimmer, Junior, entitled to dower? "A wife shall be entitled to her dower at common law in the lands of her deceased husband." Pub. Sts. c. 124, § 3. The plaintiff is the trustee appointed by the Probate Court in place of Edward D. Sohier, deceased, trustee under a resolve of the Legislature, approved April 19, 1862. Acts and Resolves, 1862, Res. c. 48. By that resolve Edward D. Sohier was authorized to sell certain parcels of real estate of which Martin Brimmer,

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Senior, died seised or entitled to, and to invest the purchase money in real or personal property, and to hold the same in trust to pay the net income to such persons as would have been entitled to the rents and profits of the real estate if no sale had been made, and upon the further trust, upon the decease of Martin Brimmer, Junior, leaving no issue, "to transfer, convey, and pay over all such purchase money as aforesaid, or the property, real or personal, wherein the same may then stand invested, to and among such person or persons as would then have been by law entitled to the real estate so sold in case no such sale had been made." It is agreed that the fund concerning which the direction of the court is sought by the plaintiff consists of investments of the proceeds of real estate belonging to Martin Brimmer, Senior, at his death, and sold by Edward D. Sohier in his lifetime under the authority of this resolve. The rights in this fund of the widow of Martin Brimmer, Junior, it is argued, are in substance the same as they would have been in the real estate if it had not been sold. We are not aware of any decisions of this court upon the question of the right of dower in an estate in fee determinable in the event of the tenant dying leaving no issue surviving him. The subject is elaborately considered in 1 Scribner, Dower, (2d ed.) 297 *et seq.*, and the English and American cases are cited up to the time of the publication of the book. See also *Pollard* v. *Slaughter*, 92 N. C. 72; Washb. Real Prop. (5th ed.) 271–276; Cameron, Law of Dower, 132–155; Jarm. Wills, (6th ed.) 836, 837.

By the bill it appears that Martin Brimmer, Junior, married Marianne Timmens, May 23, 1860, and died on January 14, 1896, leaving Marianne surviving him. By the agreed facts, filed November 9, 1896, it appears that Martin Brimmer, Junior, left a will dated December 28, 1895, which was duly probated on February 27, 1896, and which contained certain provisions for his wife; and that she has not waived the provisions for her contained in the will. The bill in this case was filed March 23, 1896, which was within six months of the probate of the will. A copy of this will has been furnished us, although it is not included in the papers which are brought before us by the reservation. It is argued that, by not waiving the provisions of her husband's will, her claim to have dower or its equivalent out of

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the property in the hands of the complainant is barred, even if otherwise she would be entitled to dower. Pub. Sts. c. 127, §§ 18–20. The only argument in reply found in the brief for the widow is this: "The fact that the widow has not waived the provisions of her husband's will does not preclude her from having dower in this property, if her husband could not dispose of it by will." As the will of Martin Brimmer, Junior, has not been made a part of the record, we cannot conclusively determine its effect upon the right of the widow to dower. The agreed facts perhaps should be held to relate to the facts existing when the bill was filed. The last clause in Pub. Sts. c. 127, § 18, is as follows: "When, after probate of such will, legal proceedings are instituted wherein its validity or effect is drawn in question, the Probate Court may within said six months, on petition of the widow and after such notice as it may order, extend the time for filing the aforesaid claim and waiver till the expiration of six months from the termination of such legal proceedings." The effect of this clause upon the right of the widow hereafter to petition the Probate Court for such an extension of time has not been argued in the present case, and the right of the widow to dower if she is not barred of it by accepting the provisions of her husband's will has not been carefully argued, and was not distinctly raised by the pleadings. We think that we ought not now to determine whether the widow is or is not entitled to claim her dower in this property, but that it should be left open for determination hereafter in this or some other proceeding, if she makes such claim.

There should be a decree that the heirs of Martin Brimmer, Senior, living at the time of the death of Martin Brimmer, Junior, are entitled to the property as if Martin Brimmer, Senior, had then died intestate. Whether the widow of Martin Brimmer, Junior, if she make claim, is entitled to dower or what is equivalent to dower in the property, unless she is barred of it by the acceptance by her of the provisions of her husband's will in her favor, or by her failure seasonably to waive these provisions, and whether she has been thus barred, must be determined hereafter, either in this or some other proceeding. The decree must be without prejudice to such a claim, and the details of it may be settled by a single justice. Whether

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the trustee has power to sell the trust property and pay the shares in cash to the persons entitled thereto, or must divide it specifically, cannot now be determined. The papers do not show what the trust property consists of, and we do not know whether it is real or personal property, or partly one and partly the other. This question can best be determined in a separate proceeding, unless the parties interested agree, to which proceeding all persons interested, and no other, should be made parties. See *Heard* v. *Read, post.* *Decree accordingly.*

J. THEODORE HEARD & another, trustees, *vs.* JOHN READ & others, executors, & others.

Suffolk. January 27, 1897. — October 2, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Will — Termination of Trust — Contingent Interest — Division "among my Heirs at Law as though I died intestate" — Power of Trustees to sell and convert into Money — Costs.

A testator by will gave his daughter his household furniture, etc. absolutely, and his dwelling-house for life, and he then gave the residue, including the reversion of the dwelling-house, to trustees to pay the net income to the daughter for life. The will further provided: "At and after the decease of my said daughter, I give the said trust premises to her issue, equally to be divided between and among them, if more than one, in fee simple, the children of any deceased child of my said daughter to take the parent's share by representation. If my said daughter shall leave no issue surviving her, the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. H. and his heirs in fee forever, and the other part shall be divided among my heirs at law as though I died intestate." The trustees were given power "to sell any and all real estate, of which the trust premises shall be at any time composed," and reinvest the premises. At the time of the testator's decease, in 1867, his wife was not living and his daughter was in her forty-third year. Her husband, who was alive when the will was made, died before the testator. John T. H., who was the only child of the testator's wife by a former husband, died in 1880, leaving a wife, and, as his only heir at law, a son, J. Theodore H. He gave by will the residuum of his estate to his wife, who died in 1885, leaving as her only heir at law said J. Theodore H. *Held*, on the death of the testator's daughter, that J. Theodore H. took one half of the trust property, and the heirs of the testator, to be determined as of the time of the death of the testator's daughter, the other half;

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that one half of the real estate could be conveyed directly to J. Theodore H., and it was to be left for the trustees to determine whether they could safely pay one half of the personal property to him, or whether administrators of the estates of John T. H. and his wife should be appointed; that the trustees for the half given to the daughter for life had the power to sell and convert into money the personalty, unless those interested consented to a division, if they were more than one, and the fractions were such that the different kinds of property could not specifically be divided; that as to the realty the power to sell was primarily intended to be used for the purpose of investment, the only duty of the trustees being to settle their accounts and pay over the principal directed in the will; that whether authority could be given to them to sell the real estate and divide the proceeds, if necessary, could not now be determined, as there were no sufficient allegations in the bill on which the question could be decided; and that this was not a case in which taxable costs should be allowed against any party, but if application should be made to a single justice for allowance of costs as between solicitor and client out of the fund, it might be considered by him whether such costs should be allowed, and, if so, whether they should be charged upon the whole fund or only upon the half which went to the testator's heirs at law.

BILL IN EQUITY, by the trustees under the will of John W. Trull, to obtain the instructions of the court as to its construction. After giving his daughter, Mrs. Elizabeth Eldredge, his household furniture, etc. absolutely, and the improvement during her life of his dwelling-house in Beacon Street, Boston, and making a pecuniary provision for his stepson, John T. Heard, and John Theodore Heard, the son of his stepson, he gave the residue, including the reversion of the dwelling-house, to trustees, to pay the net income to Mrs. Elizabeth Eldredge for life, and "At and after the decease of my said daughter, I give the said trust premises to her issue, equally to be divided between and among them, if more than one, in fee simple, the children of any deceased child of my said daughter to take the parent's share by representation. If my said daughter shall leave no issue surviving her, the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. Heard and his heirs in fee forever, and the other part shall be divided among my heirs at law, as though I died intestate. I give my said trustees and their successors, and any persons acting as trustees under this will, full power and authority to sell any and all real estate, of which the trust premises shall be at any time composed, and to make any and all deeds, and do any and all acts necessary or proper for carrying into full effect any and all such sales;

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and the purchasers from such trustees shall not be bound to see to the application of the purchase money. And I give my said trustees, and their successors, and any persons acting as trustees under this will, full power and authority to invest, reinvest, and change any and all property of which the trust premises shall be at any time composed."

The prayer was for instructions upon the following points:

"1. What person or persons are entitled to the principal of the trust estate now in your petitioners' hands, and in what proportions?

"2. Whether your petitioners have the power to sell the said trust property both real and personal, and to pay over the net proceeds thereof in cash to the persons entitled thereto, or

"3. Whether they are to divide the personal, so far as it is possible so to do, among the persons entitled thereto, selling only sufficient thereof to raise the cash to make the division just and equal, or

"4. Whether the real estate passes by the will to the persons entitled thereto, and in the proportion which the court in this case shall adjudge, or

"5. Whether they are to convey the said real estate to said persons as tenants in common in said proportion, or

"6. Whether they are to make partition thereof and then convey the several parcels or portions of parcels to such persons."

The case was reserved by *Knowlton*, J., at the request of the parties upon the bill and answers for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in January, 1897, and afterwards was submitted on briefs to all the justices.

R. M. Morse & S. Lincoln, for the executors.

G. F. Richardson & F. N. Wier, (*G. A. Sanderson* with them,) for certain nephews and others.

J. M. Codman, Jr., for certain defendants, filed a brief.

J. Davis & F. Joy, for other defendants, also filed a brief.

FIELD, C. J. This is a bill for instructions, brought by the trustees under the will of John W. Trull. The will is dated November 11, 1858. At that time John W. Trull was a widower, between seventy-five and seventy-six years of age, having been born on May 12, 1783. He died on April 12, 1867. He

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had been married to a Mrs. Heard, a widow, who died before the will was made, and by her he had one child only, a daughter, Elizabeth, who was born on August 29, 1816, and had married a Mr. Eldredge, and she is the person designated as Mrs. Elizabeth Eldredge in the will. At the time the will was made she was in the forty-third year of her age. She died on July 4, 1895, never having had issue, and leaving no husband surviving her. In many of the answers of the defendants in this suit it is averred that she was a widow at the time when the will was made, as well as at the time when John W. Trull died, but at the argument it was conceded that Mr. Eldredge, her husband, was alive at the time when the will was made, and had died before John W. Trull died. Mrs. Eldredge never married again, and she died testate, and the executors of her will have been made parties defendant. John T. Heard, Esquire, mentioned in the will, was the only child of Mrs. John W. Trull by her former husband. John T. Heard died on December 1, 1880, leaving a wife, Almira P. Heard, and, as his only heir at law, his son, J. Theodore Heard, also mentioned in the will of John W. Trull, and one of the complainants in the present suit. John T. Heard left a will in which he devised and bequeathed all the residue of his estate to his wife Almira P. Heard, and appointed her executrix, and she duly qualified as such. She died intestate on April 2, 1885, not having married again, and leaving as her only heir at law said J. Theodore Heard. John W. Trull was one of the children of John Trull, and a schedule of the descendants of John Trull is annexed to the bill. Mrs. Elizabeth Eldredge having died leaving no issue surviving her, the principal questions in the case are whether the one half of the trust property which the testator directed should at her decease leaving no issue surviving her be "divided among my heirs at law, as though I died intestate," belongs wholly to the estate of Mrs. Elizabeth Eldredge, or is to be divided among the descendants of John Trull who would be the heirs of John W. Trull if Mrs. Eldredge is excluded, and, if it is to be divided among such heirs, whether they are to be determined as of the time of the death of John W. Trull or of Mrs. Eldredge. It is not seriously disputed that the other one half of the trust property which in the event that has happened was to "go to and be held by the said John T. Heard and his

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heirs in fee forever," belongs to J. Theodore Heard. So far as this one half is concerned, it is not absolutely necessary to determine whether it must be regarded as vesting in John T. Heard and his heirs on the death of John W. Trull, or as contingent until the death of Mrs. Eldredge without issue surviving her. We think, however, that the interest of John T. Heard and his heirs in the estate of John W. Trull was in a sense contingent until the death of Mrs. Eldredge without issue surviving her, because until her death it could not be certainly known whether she would leave issue surviving her. Still, this interest would be alienable, descendible, and devisable, subject to such contingency, and it would pass, subject to the contingency, as a part of the estate of John T. Heard by his will. That will is not set out in the papers before us, but the statement in the bill of complaint, that by his will he devised all the residue of his estate to his wife, is to be taken as true under the admissions contained in the answers of those defendants who have answered, and under the decrees taking the bill for confessed as against those defendants who have not answered. It is nowhere suggested that John T. Heard in his will gave this contingent interest in the estate of John W. Trull to any other person than his wife, or that she after his death assigned it to any person. It may be assumed, in the absence of any suggestion to the contrary, that on her death, which was before that of Mrs. Eldredge, it passed to her son, J. Theodore Heard, as her sole heir at law.

A distinction should be made between real and personal estate. Strictly speaking, the personal estate, or that which should be regarded as the personal estate of this one half of the trust fund, should be paid to the administrator with the will annexed of the estate of said John T. Heard, who, after paying the debts of the estate, if there are any, and the expenses of administration, should pay it to the administrator of the estate of Almira P. Heard, who, after paying the debts of this estate, if there are any, and the expenses of administration, should pay it to J. Theodore Heard. The administrator of neither of these estates has been made a party to the bill, and we do not know that there are such administrators in existence, but, if deemed necessary, they can be appointed. One half of the real estate can be conveyed directly to J. Theodore Heard. It may be left for the

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trustees to determine whether they can safely pay one half of the personal property to him, or whether administrators of these estates should be appointed. *Winslow* v. *Goodwin*, 7 Met. 363. *Childs* v. *Russell*, 11 Met. 16. *Welsh* v. *Woodbury*, 144 Mass. 542. *Bancroft* v. *Fitch*, 164 Mass. 401.

A majority of the court think it manifest, on reading the will, that the testator never intended to give to Mrs. Eldredge out of the residue of his estate anything more than the net income of it during her life. He gave this residue in trust, but he gave to her no power of disposition over the principal of the trust, either by deed or by will. At and after her decease he gave the "trust premises to her issue, equally to be divided between and among them, if more than one, in fee simple, the children of any deceased child of my said daughter to take the parent's share by representation." Such issue, if any had survived Mrs. Eldredge, would have taken the "trust premises" directly under the will of John W. Trull, and not as heirs or distributees of the estate of Mrs. Eldredge. If Mrs. Eldredge left no issue surviving her, it cannot be said that the testator had no purpose to express concerning the disposition of the "trust premises." He directed that one half of the "trust premises" should go to his stepson and his heirs, and the other half should be divided among his heirs at law "as though I died intestate." There is no indication in the will that the testator contemplated the possibility of marrying again and having other children than Mrs. Eldredge. He made no provision for that, and evidently did not regard it as probable. He may or may not have known that, if he married again and had a child by the marriage, the will *ipso facto* would be revoked, but he may be presumed to have known that at the time the will was made Mrs. Eldredge was his only heir presumptive, and that if she survived him she would, unless he married again and had a child, be his only heir at the time of his death.

After giving Mrs. Eldredge his household furniture, etc. absolutely, and the improvement during her life of his dwelling-house in Beacon Street, Boston, and making a pecuniary provision for his stepson and the son of his stepson, the testator established the trust of the residue and expressly included in the trust property the reversion of the dwelling-house. Whether Mrs. Eldredge

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was a widow or not at the time the will was made is not very material. There was very little probability of her ever having children, still it was possible. The testator accordingly made provision for her during her life, and for her issue, if she died leaving issue surviving her; but if she died leaving no issue surviving her, there is no intimation in the will that he desired that any part of the principal of the trust property should go to her heirs at law as distinguished from his, or should go to such persons as she should appoint, or that she should have by will or by deed any power of disposition over any part of it. If such is the result, it is the effect of the construction to be given to the words "the other part shall be divided among my heirs at law, as though I died intestate," when there is nothing else in the will indicating that such a result was desired by the testator, but the language of the will in our opinion indicates the contrary.

It is argued that it is a well established rule of law that, when a testator in his will refers to his heirs at law as persons to take any part of his estate, he is presumed to mean his heirs to be determined as of the time of his death, unless it plainly appears that he intends that the heirs should be determined as of some other time. This rule, it is said, was originally established on the ground that the law favors vested rather than contingent remainders. But since contingent remainders in property are within certain limits protected by the law, and are now held to be alienable, descendible, and devisable in the same manner as vested interests, and testators are permitted to make such lawful disposition of their property as they see fit, there is no reason why their intentions as expressed in their wills, so far as the law permits, should not specifically be carried into effect. The tendency of the modern cases is therefore to put the reason of the rule, not on any fondness which the law has for vested over contingent interests, but upon the fact that heirs at law by the very meaning of the words are usually those persons who take inheritable real property immediately on the death of the owner if he dies intestate. When, therefore, these words are used in a will without anything to modify their meaning, it reasonably may be taken that they mean those persons who would have taken the real estate of the testator as of the time

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of his death if he had died intestate. Upon the question whether the customary meaning of these words when used in a will is to be regarded as modified by the other provisions of the will, not only particular clauses but the whole scope of the will must be considered. The rule contended for is not a rule of substantive law, but a rule of interpretation which has been adopted by the courts as one means of ascertaining the intention of the testator as expressed in his will, and it never should be used to defeat what from the whole will appears with reasonable certainty to have been his intention. It has been intimated by this court, but with some doubt, that where property is given by will to a person for life, and on his death without issue surviving him to the testator's heirs at law, and it is known to the testator at the time when the will is made that that person is his sole heir presumptive and probably will be his sole heir when he dies, if such person survive him it is to be inferred that that person is not intended by the designation of the testator's heirs at law. But in the cases actually decided in this Commonwealth there were other provisions in the will which supported this construction. The cases generally on this subject have been often considered by this court. The present tendency in this country is against absolute rules of construction, and in favor of a careful consideration of the particular language of each will, as well as of its general scope and purpose, in order to determine, in view of the circumstances known to the testator when the will was made, his intention as expressed in it. *Sears* v. *Russell*, 8 Gray, 86. *Knowlton* v. *Sanderson*, 141 Mass. 323. *Fargo* v. *Miller*, 150 Mass. 225. *Wood* v. *Bullard*, 151 Mass. 324. *Peck* v. *Carlton*, 154 Mass. 231. *Eager* v. *Whitney*, 163 Mass. 463. *Welch* v. *Brimmer*, *ante*, 204. *Delaney* v. *McCormack*, 88 N. Y. 174. *Hardy* v. *Gage*, 66 N. H. 552. *Robison* v. *Portland Orphan Asylum*, 123 U. S. 702.

In the present case, not only particular phrases of the will, but its general purport in the event which has happened and which the testator must have contemplated, seem to us inconsistent with any intention that Mrs. Eldredge, if she shall leave no issue surviving her, should take as sole heir one half of the trust property. The effect of such a construction would be that Mrs. Eldredge in her lifetime could have transferred this one half to

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strangers subject to the contingency of her leaving issue surviving her, or could have given it by will, or, if she died intestate without leaving issue surviving her and not having alienated it, that it would go to her heirs or distributees as distinguished from the heirs of the testator. The direction that "the other part shall be divided among my heirs at law" perhaps tends to show that the testator expected that there might be more than one heir. The words, "At and after the decease of my said daughter, I give," etc., and the words, "If my said daughter shall leave no issue surviving her, the trust premises shall, at her decease, be divided," etc., although not in law absolutely inconsistent with a gift to take effect immediately upon the death of the testator to persons to be ascertained as of that time, yet to the mind of an intelligent layman describe rather a gift of property to take effect on the death of the daughter to persons then to be ascertained, than one to take effect immediately on the death of the testator, and have some tendency to show that the daughter was not to be included in the heirs among whom the one half "shall be divided." A good deal of stress has been laid in argument upon the words "as though I died intestate." It is argued on the one side that these words mean "in the same proportions as if I had died intestate," or that they mean "to the same persons and in the same proportions as if I had died intestate." It is argued on the other side that the words should be interpreted as if they were "as though I then died intestate," and not as if they were "as though I had died intestate." Considering all the provisions of the will, a majority of the court are of opinion that the testator had in mind his heirs at law living at the time of the decease of his daughter, when the one half was to be divided among his heirs at law; and that the words mean "as though I then died intestate."

The heirs of John W. Trull, to be determined as of the time of the death of Mrs. Eldredge, in our opinion, take this one half as if he had died intestate when Mrs. Eldredge died. The principal of the trust fund is a mixed fund of real and personal estate, and the persons who take both the real and the personal estate on the death of Mrs. Eldredge under our decisions must be the same, and they are those heirs of the testator living when Mrs. Eldredge died who would inherit real estate. *Fabens* v. *Fabens*,

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141 Mass. 395. *Lincoln* v. *Perry*, 149 Mass. 368. *Olney* v. *Lovering*, 167 Mass. 446.

The trustees necessarily must have the power to sell and convert into money the personal property unless the persons interested consent to a division of it if they are more than one, and the fractions are such that the different kinds of property cannot be specifically divided. With reference to the real property, although the power given to the trustees of the will to sell it is ample, yet real estate always can be conveyed in fractional undivided parts, and we think that this power to sell was primarily intended to be used for the purpose of investment and reinvestment while the trust was active. Now the only duty of the trustees is to settle their accounts and divide, convey, and pay over the principal of the trust property according to the directions of the will. Whether authority could be given to them to sell the real estate and divide the proceeds if this were found reasonably necessary, need not now be determined, and there are no sufficient allegations in the bill as it stands on which this question can be decided. By the decree in this case it will be determined who the persons are who take the principal of this trust property, real and personal, and if there are reasons why the real estate cannot or should not be conveyed to them in fractional undivided parts, but should be sold by the trustees and the proceeds divided, a bill can be brought to determine what authority the trustees have, or what authority the court can give them. To such a suit all persons having an interest in the property, or their legal representatives, if any have died since the death of Mrs. Eldredge, should be made parties.

The question of costs has been argued by the counsel of J. Theodore Heard. This is not a case in which taxable costs should be allowed against any party. If application should be made to a single justice for the allowance of costs as between solicitor and client out of the fund, it then may be considered by him whether any such costs should be allowed, and, if so, whether they should be charged upon the whole fund or only upon the one half which goes to the testator's heirs at law. A decree should be entered by a single justice in accordance with this opinion.

So ordered.

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ELISHA WELLS *vs.* ELMER E. PUTNAM & others.

Franklin. September 21, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Question whether Vote of Town to release Debtor was by way of Gratuity, or because the Claim was unfounded.

In this case, which was a bill in equity to restrain the defendant from foreclosing a mortgage held by him as trustee for the inhabitants of a town, on the ground that they had voted to release the plaintiff from all liability thereon, the report was discharged, the court saying that it should be first found whether the vote to release was by way of gratuity, or because the claim was regarded as unfounded.

BILL IN EQUITY, filed in the Superior Court, October 26, 1896, to restrain the defendant Putnam from foreclosing a mortgage held by him as trustee for the inhabitants of Deerfield. The inhabitants of Deerfield made no answer, and as to them the bill was taken as confessed.

At the trial, without a jury, before *Bishop*, J., there was evidence tending to show that the plaintiff signed as surety two bonds of one Stebbins as tax collector of the town of Deerfield for the years 1892 and 1893; that during those years and the years 1894 and 1895 Stebbins embezzled taxes collected by him to the amount of about $9,000; that he was indicted therefor, and, upon his plea of guilty, was sentenced; that Stebbins had never paid to the town the money so embezzled; that in May, 1895, two suits were begun by the town of Deerfield upon the bonds of Stebbins as tax collector, and against the plaintiff as one of the sureties on each of the bonds, on account of the breaches of the conditions thereof by reason of said embezzlements; that there were controversies between the plaintiff and the representatives and agents of the town as to the extent of the plaintiff's liability on each of the bonds, and in compromise and settlement of said controversies the plaintiff gave his promissory note, dated July 24, 1895, to one Aldrich, who had been chosen an agent of the town in the controversies, payable in one year after date to said Aldrich or order, for the sum of $2,350,

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with interest at five per cent per annum; that the plaintiff executed and delivered to Aldrich a mortgage deed, containing a power of sale in the usual form of nine different parcels of land, as security for the note and of even date therewith, and that Aldrich on the same day executed an instrument declaring that he held the note and mortgage in trust to pay the avails thereof to the town.

It appeared that Aldrich subsequently resigned his position as agent and trustee, and on June 19, 1896, the defendant Putnam was chosen in his place, and Aldrich transferred to Putnam the note and assigned to him the mortgage. Neither the principal of the note nor the interest were paid at maturity, nor have they since been paid.

The defendant as assignee of the mortgage deed, and by virtue of the power of sale therein, advertised the lands described therein for sale, by public auction, on October 14, 1896, and on that day adjourned the sale to October 28, 1896.

The inhabitants of the town of Deerfield, on October 10, 1896, at a town meeting, under a proper article in the warrant, voted to release the plaintiff from the note and mortgage, and also voted at the same meeting that the defendant Putnam be directed to cancel all obligations given by the plaintiff in favor of the town in the Stebbins matter, which might appear on record in the registry of deeds, and also to surrender to the plaintiff the note and mortgage given by him to secure the payment to the town of $2,350, under date of July 24, 1895. At another town meeting, held on October 23, 1896, and under a proper article in the warrant, the town voted not to rescind its action at the meeting of October 10, 1896, releasing the plaintiff from his obligation to the town.

The plaintiff after each of the town meetings demanded of Putnam the note and he refused to surrender or cancel it, and Putnam has not released, cancelled, or discharged the mortgage. A large number of the taxable voters present at each of said town meetings voted against the proposition to release the plaintiff from his obligation to the town. The defendant Putnam, in his answer, alleged that he intended to disregard the votes of the town by reason that large numbers of the taxable inhabitants voted against the proposition to release the plaintiff from his obligation, and by reason that said votes were passed

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without authority of law, and the attempt to release the plaintiff from his obligation was *ultra vires* and void.

The judge reserved the case for the consideration of the full court, such decree to be entered as law and justice might require.

J. A. Aiken, for the plaintiff.

P. D. Martin, (*C. F. A. Eddy* with him,) for the defendant Putnam.

HOLMES, J. There is no doubt that a town may release a part of a debt by way of compromise. *Matthews* v. *Westborough*, 131 Mass. 521, and 134 Mass. 555. *Prout* v. *Pittsfield Fire District*, 154 Mass. 450. *Agnew* v. *Brall*, 124 Ill. 312. We assume that it might release the whole upon considerations of paramount convenience and indirect pecuniary advantage, as to qualify a witness. *Ford* v. *Clough*, 8 Greenl. 334, 344. It may be, very likely, that it can do so on vaguer grounds of convenience or justice. See *Friend* v. *Gilbert*, 108 Mass. 408. But it cannot release an admitted debt against the dissent of a minority by way of a mere gift. See *Mead* v. *Acton*, 139 Mass. 341; *Agnew* v. *Brall*, 124 Ill. 312, 315.

Whether in the present case the vote to release the plaintiff's note and mortgage was more than a simple gratuity is a question to be determined from the history and circumstances of the case, and from the conduct of the plaintiff and of the town. *Matthews* v. *Westborough*, 131 Mass. 521, and 134 Mass. 555. The fact that the note was given by way of compromise of a larger claim looks as if the liability was undisputed, and the town vote a gratuitous benevolence. This impression perhaps might be strengthened if it be true, as stated at the argument, that the town had confirmed the compromise effected by its agent, and thus impliedly had adopted the view that the claim was just. But it is obvious that the fact ought to be found by the judge who tried the case and heard all the evidence. If we should pass upon the report as it now stands, we should have to act on imperfect indications or artificial presumptions, instead of a living belief such as the evidence naturally would produce. The report must be discharged, but perhaps the opinion which we have expressed upon the substantive question of the case will be sufficient to prevent the necessity of bringing it here again.

Report discharged.

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TIMOTHY J. HARTNETT *vs.* PLUMBERS' SUPPLY ASSOCIATION OF NEW ENGLAND.

Suffolk. March 2, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Quo Warranto — Private Corporation — Usurpation of Franchise — Injury to Private Right — Remedy.

A corporation was chartered under Pub. Sts. c. 115, for the purposes of "promoting pleasant relations among its members; discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business; and establishing and maintaining a place for social meetings." It consisted of about twenty firms engaged in selling plumbers' supplies, and, claiming to act under its franchises, took proceedings against persons whom its members might represent to it as owing them overdue bills for plumbers' supplies, sending notices to such persons, and also notices to its members other than the creditor, as a method of compelling the alleged debtors to pay what its members demanded, by means of threatening to expose to certain dealers their alleged delinquencies, by actually informing such dealers that those persons owed overdue accounts, and by preventing them from obtaining credit from a number of dealers in goods needed in their business; and also required such persons, where the correctness of the claim was disputed, to submit the controversy to arbitration. *Held*, that a plumber against whom the corporation had so proceeded was entitled to file an information in the nature of a *quo warranto* against the corporation. ALLEN, KNOWLTON, & LATHROP, JJ., dissenting.

PETITION, under Pub. Sts. c. 186, § 17, for leave to file an information in the nature of a *quo warranto*. Hearing before *Allen*, J., who dismissed the petition, with costs; and, the petitioner having appealed, reported the case for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

S. H. Dudley, for the petitioner.

S. J. Elder & W. C. Wait, for the respondent.

BARKER, J. The statutory provisions under which this petition is brought were introduced by St. 1851, c. 233, §§ 55–64, and have been continued in force without much change. See St. 1852, c. 312, §§ 42–50; Gen. Sts. c. 145, §§ 16–24; Pub. Sts. c. 186, §§ 17–25. In plain and positive terms they purport

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to give relief to any person whose private right or interest has been injured, or is put in hazard, by the exercise by any private corporation of a franchise or privilege not conferred by law. In the earliest cause in which they were considered, it was said that they conferred upon the court a manifestly high power, to be exercised only upon extraordinary occasions and in aggravated cases of usurpation and encroachment. See *Hastings* v. *Amherst & Belchertown Railroad*, 9 Cush. 596, 599. These views, however, were not repeated or referred to in the succeeding cases of *Lechmere Bank* v. *Boynton*, 11 Cush. 369, *Boston & Providence Railroad* v. *Midland Railroad*, 1 Gray, 340, or *Goddard* v. *Smithett*, 3 Gray, 116.

In the present condition of society, having regard to the actual power of corporations as compared with that of natural persons whose interest they affect, we think that the exercise by a private corporation of franchises or privileges not conferred by law may be a serious usurpation and encroachment, which, when it injures or puts in hazard the private rights of any person, will justify the exercise by this court of the powers given it by the statutes under consideration. In such cases, this explicitly given remedy, like that of the writ of mandamus, should now be "regarded as an ordinary process in cases to which it is applicable." See *New England Ins. Co.* v. *Phillips*, 141 Mass. 535, 546.

The respondent corporation was chartered under Pub. Sts. c. 115. The purposes for which it was formed are stated in its charter to be those of "promoting pleasant relations among its members; discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business; and establishing and maintaining a place for social meetings." Chapter 115 is entitled, "Of associations for charitable, educational, and other purposes," and authorizes corporations to be formed for the following purposes only: "For any educational, charitable, benevolent, or religious purpose; for the prosecution of any antiquarian, historical, literary, scientific, medical, artistic, monumental, or musical purposes; for supporting any missionary enterprise having for its object the dissemination of religious or educational instruction in foreign countries; for promoting temperance or morality in

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this Commonwealth; for encouraging athletic exercises or yachting; for encouraging the raising of choice breeds of domestic animals and poultry; for the association and accommodation of societies of Free Masons, Odd Fellows, Knights of Pythias, or other charitable or social bodies of a like character and purpose; for the establishment and maintenance of places for reading rooms, libraries, or social meetings." Pub. Sts. c. 115, § 2. The subsequent act authorizing the incorporation of labor or trade organizations, St. 1888, c. 134, for the purpose of improving in any lawful manner the condition of employees in any lawful trade or employment, has no bearing upon the present case.

The franchises and privileges conferred upon the respondent by law are limited by the purposes enumerated in Pub. Sts. c. 115, § 2. Business corporations are formed under Pub. Sts. c. 106, or the other chapters relating to special businesses, and for such corporations to obtain a charter a capital stock is required, and there are other pre-requisites to the granting of a charter than those required of corporations formed under Pub. Sts. c. 115.

The report finds that the respondent corporation consists of about twenty firms engaged in selling plumbers' supplies. This means only that its members are persons who are interested in such firms. It takes proceedings against persons whom its members may represent to it as owing them overdue bills for plumbers' supplies, sending notices to such persons, and also notices to its members other than the creditor. The notice sent by the corporation to the person so alleged to owe an overdue account, after reciting that he has failed to settle the demand, informs him, on behalf of the corporation, that unless he shall settle the claim within ten days the members of the corporation will be notified, and that, in consequence, he may be unable to purchase any goods from any of them except for cash before delivery, suggests that, if he has any reason why such notice should not be given, he should immediately present the same to the corporation; and concludes with the threat that inattention to this will bring about the consequences above indicated. The corporation keeps in a book the name of all persons represented to it by its members to be their delinquent debtors, and provides each of its members with a book for the

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purpose of having the names of such persons entered upon such a book in the possession of each member. After the notice has been sent by the corporation to the alleged debtor, if he does not settle the claim, or present to the corporation some reason for not doing so, the corporation sends to each of its members a formal statement that the alleged debtor's name has been entered on the books of the corporation, and that by its by-laws its members are debarred from selling goods to him, except for cash before delivery, until he shall have settled. This statement orders the members of the corporation not to fail to enter the debtor's name in the book provided for that purpose, and states his name and address, the name of his creditor, and the amount of the debt.

That the respondent claims to take such proceedings under its corporate franchises appears from its by-laws, and from the forms which it prepares and uses and sends to its members, to be used in the proceedings. The by-laws make it the duty of all members to report to the secretary any information concerning failures or financial embarrassments in the trade, and "to sell only for cash paid before delivery to customers who have unjustly failed to meet their trade contracts and obligations, and so long as that failure continues." They provide that if a member is involved as defendant in any legal proceedings growing out of his membership, and caused by his obedience to and action under the rules and by-laws of the corporation, the costs and expenses incurred shall be paid out of its funds, if the member places his case in the hands of an attorney approved by its executive committee. There is also a provision that, in cases where the correctness of accounts between members and others is disputed, the creditor shall appoint one arbitrator, the debtor another, and that the two arbitrators shall choose a third; and also that the matter may be referred to its executive committee. The blank forms prepared and issued by the respondent to be used in proceedings against persons represented to it by its members to be their debtors, are seven in number. The first is a notice to be sent by the member to the alleged debtor, stating that unless his past due account is attended to within ten days the matter will be referred to the respondent. The second is a notice from the

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member to the secretary, that the first notice has been sent to the alleged debtor, and that he has not settled the account. The third is the notice from the corporation to the alleged debtor, threatening that unless he settles the account within ten days certain consequences will follow. The fourth is a notice to be sent by the member to the secretary that the person subjected to the proceedings has failed to respond to the notice sent him by the corporation, and asking the secretary to notify every member of the facts, according to the by-laws. The fifth is the notice to be sent to the members by the secretary, informing them that the name of the person against whom the proceedings are pending has been entered on the book, and that members are debarred from selling goods to him, except for cash before delivery, until he has settled. The sixth is a notice of settlement to be sent by the member to the secretary, and the seventh is a notice to be sent by the secretary to the members that the person subjected to the proceedings has satisfactorily settled his account, and is again entitled to the same consideration as before.

In short, these proceedings against the alleged debtors of its members, instituted by the corporation under the pretended sanction of its corporate franchises, are a method of supplanting the courts by the private machinery of the corporation; of compelling such persons to pay what its members demand, by means of threatening to expose to certain dealers their alleged delinquencies, by actually informing such dealers that the persons owe overdue accounts, and by preventing such persons from obtaining credit from a number of dealers in goods needed in the business which such persons are carrying on. This private corporation assumes, in the exercise of what it claims to be the corporate privileges conferred by its charter, to require other persons to submit their controversies to arbitration, dictates the terms upon which trade shall be carried on by other persons, and requires other persons under penalties practically severe, to submit to it their reasons for their conduct in matters with which it has no concern.

A majority of the court are of opinion that the respondent's charter confers upon it no such rights. Such proceedings are not germane to the purpose of "promoting pleasant relations

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among its members," or of "establishing and maintaining a place for social meetings." The only other purpose stated in the charter is that of "discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business." If this language is construed with that which declares the other purposes of the charter, and with our body of corporation statutes, it naturally means the improvement of the plumbers' supply business by the discussion and investigation of scientific and practical matters relating thereto, rather than a purpose to interfere with the actual conduct of the business in particular instances. Such interference would itself be a business enterprise, and would not fall within any of the purposes mentioned in Pub. Sts. c. 115, § 2, for which alone corporations may be organized under that chapter. Assuming that a corporation might be formed to prosecute the business of collecting debts due to the persons who are members of the respondent corporation, and of protecting them from selling upon credit to irresponsible customers, such a corporation would be a business enterprise, and to be chartered must have a capital stock, and must comply with the provisions of Pub. Sts. c. 106, in order to obtain a legal existence and have corporate rights and privileges.

The right of instituting and conducting such proceedings as those which the respondent assumes to institute is, therefore, not conferred by law upon it, and their institution and prosecution by its officers in its behalf are corporate acts constituting the usurpation of corporate powers and privileges, some of which are granted only to courts or other public tribunals, and others of which would never be granted by a legislature.

The remaining question is whether any private right or interest of the petitioner has been injured or put in hazard by the respondent's exercise of this usurped franchise or privilege.

It is to be noticed that the hearing upon which the petition was ordered to be dismissed was the summary hearing provided for by Pub. Sts. c. 186, § 19, at which, "if there appears probable cause to believe that the party complained of has exercised a franchise or privilege not conferred by law, and that thereby the private right or interest of the complainant has been injured or is put in hazard, leave shall be granted to file the informa-

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tion," and that judgment that the corporation be excluded from such franchise or privilege can be rendered only after hearing upon the information. Pub. Sts. c. 186, § 23.

The report states that at the hearing there was not much dispute as to any questions of fact, and we infer that, as alleged in the petition, the petitioner is a plumber, having occasion to use his credit in conducting that business; that in the course of his business he became indebted to a dealer in plumbers' supplies, who was a member of the respondent corporation; that a portion of the balance claimed by his creditor to be due was in dispute; and that while a suit to recover such balance was pending, in which he had given security by a bond to dissolve the attachment, the corporation instituted proceedings against him under its by-laws, and notified its members that his name had been entered upon its book, and that its members were debarred from selling goods to him, except for cash before delivery, until he should have settled with the member to whom he was so said to be indebted. The report further states that it did not seem to the presiding justice that any right of the petitioner was infringed by the respondent's mode of procedure, and the petition was dismissed, with costs.

In the opinion of a majority of the court this conclusion was wrong. Without examining all the ways in which the respondent's mode of procedure may have injured or put in hazard the petitioner's private rights or interests, we think that they were injured or put in hazard.

The credit of a tradesman is an important, and often his most considerable resource, and he has a right to rely upon and to use it in endeavoring to do business. No one has the right to attempt to destroy or to injure his credit, unless the person so attempting can show that his own legitimate interests require such action. Assuming that the legitimate interests of sellers of plumbers' supplies may justify such persons in informing each other that a customer of one of them has not paid for his purchases, and in agreeing with each other to sell him no goods except for cash paid before delivery, the respondent has no such justification for its interference with the petitioner's business. The respondent is a legal person other than and distinct from its members. It is not a seller of plumbers' supplies, and has no

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interest in that market, and no legitimate concern with the question of who shall purchase in that market upon credit. When, without being engaged in the trade, or being in any relation by which its legitimate interests are affected by the question whether the petitioner shall have credit in that market, the respondent assumes to notify sellers of such goods that the petitioner has not paid his accounts, and to debar a considerable number of dealers from selling to him upon credit, his right to an open market, and to proffer his credit without officious interference from persons who have no legitimate interest in the question whether he shall buy upon credit, is injured and put in hazard.

Again, one of the petitioner's private rights is that he shall not be libelled in his business or trade. Under the respondent's mode of procedure, the corporation having, as a distinct legal person, no interest in the trade, nor in the dispute between the purchaser and its member, there is no privilege to justify the communication to it or by it of the facts which it assumes to communicate. Such written communications tend to injure the purchaser in his business, and, if not justified, may be libels which injure him in his private rights, or put them in hazard, within the meaning of the statute, besides being actionable torts. See Odgers, Libel & Slander, (3d ed.) 86, 87, and cases cited; *Capital & Counties Bank* v. *Henty*, 7 App. Cas. 741. The statements concerning the petitioner published by the respondent to its members were calculated to convey to them imputations upon the petitioner injurious to him in his business, and were not made in the discharge of any public or private duty, legal or moral, in the conduct of the respondent's own legitimate affairs in matters in which its own legitimate interests were concerned. In the whole procedure the respondent acts officiously and without right, having itself no interest in the matters about which it publishes statements calculated to injure in their business persons who are not its members, and with whom it has no business or other relations save those which it usurps.

We think, therefore, that upon the report there appears probable cause to believe that the respondent has exercised a franchise or privilege not conferred by law, and that thereby the

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petitioner's private right or interest has been injured, or is put in hazard, and that leave should be granted him to file an information. This makes it necessary to reverse the decree dismissing the petition. *So ordered.*

Mr. Justice Allen, Mr. Justice Knowlton, and Mr. Justice Lathrop do not concur in the result reached by the majority of the court.

BOWDOIN B. CROWNINSHIELD *vs.* CHARLES H. W. FOSTER.

Suffolk. March 8, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Broker's Commission — Action — Instructions.

If a broker, who is employed by the owner to sell an estate, brings it to the attention of the person who finally buys it, and obtains from him an offer which is rejected by the owner, and the broker thereupon suspends his efforts, and afterwards another broker, in ignorance of the former's employment, procures from the same person another and substantially different offer, which is accepted by the owner, in an action by the first broker to recover a commission of the owner, exceptions taken by the latter to instructions which did not point out sufficiently the difference between the two offers, and may have misled the jury to find for the plaintiff, will be sustained.

CONTRACT, to recover a commission on a sale of real estate in Brookline. At the trial in the Superior Court, before *Richardson*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts material to the point decided appear in the opinion.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

M. Storey, for the defendant.

E. W. Hutchins, for the plaintiff.

ALLEN, J. It was held in *Dowling* v. *Morrill*, 165 Mass. 491, that a broker who does not have the exclusive sale of real estate does not become entitled to a commission merely by bringing the property to the attention of the person who finally buys it,

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but he must also show that his services were the efficient or effective means of bringing about the actual sale. In the present case the plaintiff brought the property to the attention of Allen, the person who finally bought it, and obtained from him two different offers, both of which were rejected by the defendant; and there was evidence tending to show that the plaintiff thereupon suspended his efforts, and that afterwards another broker, in ignorance that the plaintiff had treated with Allen, procured from the latter another and different offer, which the defendant accepted.

With reference to this state of things the court instructed the jury as follows: "The mere fact that Mr. Foster got a little more, if he did, in the way of trade than what Mr. Crowninshield got offers for from Mr. Allen, I do not think is decisive; still it is one of the things that you may consider, because I do not think it would debar a broker from obtaining his commission if he was otherwise entitled to it, if he got offers for a smaller sum, if it was substantially the same amount, or if he got more, without using the word 'substantially,' than what he told the broker he would sell it for."

The plaintiff afterwards asked for specific instructions, as follows: "If the jury find that the defendant employed the plaintiff to bring him offers for property, and the plaintiff interested Allen in the property and communicated Allen's offer to the defendant, which the defendant rejected, and then the defendant renewed the same negotiations, either himself or through another broker, and finally accepted substantially the same offer from Allen as had been made by the plaintiff, the plaintiff is entitled to recover. If the plaintiff, being employed by the defendant to find a customer for the Foster estate, found Allen ready and willing to [buy?], but giving in part payment therefor his apartment houses, and on presenting the offer of Allen, was informed by the defendant he would not sell for the apartment houses on any terms, . . . and in consequence of this, the plaintiff ceased efforts to bring about the trade between Allen and the defendant, and the defendant shortly afterwards changed his mind and took the apartment houses in exchange for his land on substantially the same terms offered by the plaintiff and in consequence of the previous negotiations,

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the plaintiff is entitled to recover, although another broker acted in the final negotiations."

In reply to these requests, which the judge read to the jury, (as was agreed by counsel at the argument before us,) the court said: "I think all of these things are stated in a little different way, perhaps better, than what I stated." This, it seems to us, was a virtual assent to the correctness of the requests, as propositions of law, and the jury were allowed to find for the plaintiff if in their opinion the offer which was finally accepted, upon a renewal of the negotiations, was substantially the same as either of the offers which the plaintiff had procured.

The first offer which the plaintiff had procured from Allen was to give in exchange three apartment houses, two unencumbered and one subject to a mortgage for $15,000, and also the equity in three dwelling-houses. In this offer, Allen valued the three apartment houses at $25,000 each, making a total, after deducting the mortgage, of $60,000; and the equity in the three dwelling-houses at $10,000 each, or $30,000 for them all.

The second offer procured by the plaintiff was the three apartment houses, as above stated, and a mortgage for $30,000 upon the property taken from the defendant; Allen agreeing to take a lease of the apartment houses for one year at a rent equal to five per cent on their price.

By the sale as actually made, Allen gave two mortgages for $85,000 upon the Foster property, and equities in the apartment houses estimated at $15,000, based on a valuation of $70,000 for the three, instead of $75,000 as in the previous offers. It is fairly to be assumed that the mortgages for $85,000 were accompanied by promissory notes for that sum, payable with interest. There has been no suggestion to the contrary, or that Allen was irresponsible personally. According to the plaintiff's testimony, the defendant was willing to sell to Allen for $90,000, payable $5,000 in cash and the balance in a mortgage back on the property, the purchaser to spend $50,000 within a year on the property. The defendant got the mortgage as proposed, and the equities estimated at $15,000 instead of the $5,000 in cash; and he did not get the agreement for future expenditures on the property. Upon the evidence set forth in the bill of exceptions, it seems to us that the offer which was accepted was substan-

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tially different from either of the offers procured by the plaintiff, and that the difference between them was not sufficiently pointed out to the jury, and that the offer so accepted could not properly be treated or considered as substantially the same as the previous offers, and that the jury may have been misled in their verdict by the manner in which this aspect of the case was submitted to them. For this reason, the entry must be,

Exceptions sustained.

ELIZABETH A. L. ATKINSON *vs.* CITY COUNCIL OF NEWTON. EDWARD B. TOWNE *vs.* SAME.

Middlesex. March 12, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Betterment — Validity of Assessment — Agreement between Landowner and City as to Damages and Betterments — Amendment of Order — Certiorari.

Contributions made by landowners under an agreement with the city by authority of St. 1884, c. 226, by which they release the damages caused by taking their lands for the construction of a way, and pay a part of the cost of such construction and a part of the damages recovered by other landowners, and the city assumes their betterment assessments, are not voluntary gifts to be deducted from the cost of the way.

An agreement made under St. 1884, c. 226, by which landowners agree to release the damages caused by taking their lands for the construction of a way and to contribute and pay to the city one third of the cost of such construction, "being credited, however, with the betterments assessed on land of those abutters who do not sign this proposal," and further to save the city harmless from damages which any owner who does not sign the offer may recover, "upon being subrogated to and credited with the betterments assessed or to be assessed by said city on such owners respectively," and the city agrees to assume the betterment assessments, does not invalidate such assessment.

An order of a city council for the assessment of a betterment, which, by a clerical error, misstates the amount of the total expense on which the assessment is based, may be amended by substituting the amount of the actual expense, and it is not necessary to give any notice of the amendment, or to reassess the betterment.

Persons who lie by and permit great expenditures to be made, the benefits of which they will enjoy, are not to be allowed to avoid responsibility for the payment of any share of such expenditures by afterwards having the proceedings under which they were incurred quashed on certiorari.

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TWO PETITIONS for writs of certiorari to quash the proceedings of the respondent in laying a betterment assessment upon the land of the respective petitioners. The cases were heard together, before *Barker*, J., who reserved them for the consideration of the full court, in substance as follows.

It appeared that on or about January 1, 1894, certain citizens of Newton presented a petition to the city council, praying that a street should be laid out and constructed from Valentine Street to Washington Street in Newton, to be one hundred and twenty feet in width, to include two sidewalks, two roadways, and a reserved space in the centre thereof of thirty feet for the use of an electric railway; that on or about that day certain landowners owning land on the line of the proposed street or boulevard offered and agreed with the city, in case such street or boulevard should be laid out through their lands, to contribute without expense to the city such portions of their respective lands over which such section of the boulevard might run, and release the city from all damage by the taking thereof, and further to contribute to the city a sum equal to one third of the cost of the construction of such street, "being credited, however, with the betterments assessed on land of those abutters who do not sign this proposal," and further agreed that, in case land of owners who did not sign such agreement should be taken for such street, they would save the city harmless from any damages which any such owner might recover against the city by reason of such taking over and above any benefit which such owner might receive by the location of such boulevard, "upon being subrogated to and credited with the betterments assessed or to be assessed by said city on such owners respectively," the city agreeing that such contribution should be in lieu of any betterment upon land of the subscribers. The petitioners did not sign such agreement, and a portion of their premises was taken in the laying out of the street.

It further appeared that on or about May 10, 1894, the respondent laid out the boulevard or way between the points specified, under the provisions of law authorizing the assessment of betterments; that thereafter the respondent authorized the construction of the way, and the same was built and opened for public travel; that the parties signing the agreement contributed

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large sums of money toward the expense of the way, under and in accordance with the agreement; that on or about October 15, 1895, the respondent assessed a betterment upon certain real estate, including that of the petitioners, to cover the expense of the laying out and construction of the street; that in the order the expense of construction of the way was stated to be $112,000, and the amount of betterments assessed $116,173; that on or about November 5, 1895, the respondent passed a further order, amending the last named order, changing certain words therein, and reciting that the expense of the construction was $117,018, it appearing from the return of the respondent that the original statement of the expense was a clerical error; and that afterwards a notice was sent to the petitioners and other parties of such assessment of betterments.

The case was argued at the bar in March, 1897, and afterwards was submitted on briefs to all the justices.

R. M. Saltonstall, (*J. E. Cotter* with him,) for the petitioners.

W. S. Slocum, for the respondent.

BARKER, J. Under the common method in which public ways are laid out, altered, widened, or discontinued, the whole amount actually expended in making the improvement is ordinarily borne by the public. There may be voluntary private contributions reducing the amount of the public charge, and such contributions do not invalidate the acts of the authorities charged with the duty of adjudging whether the improvement shall be made, and its details. *Parks* v. *Boston*, 8 Pick. 218. *Freetown* v. *Bristol*, 9 Pick. 46. *Copeland* v. *Packard*, 16 Pick. 217. *Crocket* v. *Boston*, 5 Cush. 182. *Arlington* v. *Cutter*, 114 Mass. 344. *Dudley* v. *Cilley*, 5 N. H. 558. *Townsend* v. *Hoyle*, 20 Conn. 1. Dillon, Mun. Corp. (4th ed.) §§ 458, 596. Aside from such contributions, the public ordinarily bears the whole expense actually paid out, and looks only to general taxation for reimbursement. If there are lands which receive from the improvement a benefit or advantage beyond the general advantages to all real estate in the city or town, such peculiar benefit is used to offset and reduce the damage done by taking some part of the land, or injuring it in any other manner, but can be availed of by the public in no other way, and can in no event be availed of to reimburse the public for any expenditure actually paid out in making the improvement.

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In the development of the country, and particularly in the growth of towns and cities, owners of considerable tracts of land often find it for their pecuniary advantage to lay out and construct streets wholly at their own cost, being more than made good by the increased value of their remaining lands, due wholly to the making of the way.

The theory of our provisions of law authorizing the assessment of betterments, now contained in Pub. Sts. c. 51, and some additional statutes, (see Sts. 1882, c. 154, § 7; 1884, cc. 226, 237, 280; 1885, c. 299; 1886, c. 210; 1887, c. 124; 1891, c. 170, § 3; 1893, c. 300, § 2; 1894, c. 288, § 2; 1896, c. 158,) is that in some instances it is just that the public should be reimbursed in whole or in part for the expense of a public improvement by the owners of lands which it peculiarly benefits, limiting the maximum contribution from any particular owner to an amount well within that of his own peculiar or special benefit which he receives in the increased value of his land.

As the instances in which such a forced contribution to the cost of a public improvement is just are frequent in places containing a large population, the betterment laws are in force in cities, while in towns they are not in force unless accepted by the inhabitants. But as it would not be wise or just to have all such improvements made under the betterment system, the authorities charged with deciding whether the improvement shall be made, when they adjudge that it shall be made, determine whether it shall be done under the betterment acts, or in the ordinary way.

If done under the betterment acts, the general plan of enforcing the contribution from the individual landowner is to ascertain, after the completion of the improvement, its whole cost, including full land damages fixed at the value of the land before the making of the improvement, deducting only the value of materials removed by the owner, or of parts of buildings remaining when the value of buildings is allowed for. The peculiar benefit and advantage to every parcel of land which receives from the improvement a benefit or advantage beyond the general advantages to all real estate in the city or town is then adjudged by the authorities who ordered the improvement, and a proportional share of the whole expense of the improve-

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ment is assessed by the same authorities upon each parcel of land so peculiarly benefited, with the restriction that no such assessment shall exceed one half the amount of such adjudged benefit and advantage. Thus no person can be forced to contribute in this way more than one half of the peculiar benefit which has been given him by the public in making the improvement.

In the practical working of the system, if the peculiar benefits conferred by the improvement upon individual landowners are more than twice as much as its cost, or just twice as much, its whole cost may be reimbursed to the public by these forced contributions, and nothing borne by general taxation. If the peculiar benefits are less than twice the cost of the improvement, a deficit will remain to be paid out of the proceeds of general taxation.

It is obvious that large powers rest in the hands of those who administer the system. They are to determine whether the cost shall be defrayed by taxation upon the whole municipality, or to a large extent by the owners of a comparatively small body of land so situated as to be peculiarly affected in value by the improvement. In their judgment lies also the determination of what lands are so affected, and the amount of the peculiar benefit, and of the whole value of the land so benefited. When these matters of judgment have been determined, the amount of each particular assessment is a matter of computation.

The power of the Legislature to assess upon the abutting estates the whole cost of the improvement of a street was affirmed in the case of *Dorgan* v. *Boston*, 12 Allen, 223, decided in January, 1866, the case having arisen under St. 1865, c. 159, requiring the aldermen of Boston to widen and lay out as a street Washington Square and adjoining streets. In the same year a betterment act, St. 1866, c. 174, was made operative in Boston, and was the next year extended to Charlestown. St. 1867, c. 224. The constitutionality of this statute was affirmed by the court in 1870 in *Jones* v. *Boston*, 104 Mass. 461, upon the ground that the statute did not authorize the aldermen to select at their pleasure some of the estates benefited by the improvement and lay an assessment upon them, but that the

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assessment was to be laid ratably upon all the abutting estates which received any benefit. Before this decision, the betterment act of Boston had been made applicable by St. 1868, c. 75, to any city whose city council should accept it, and in St. 1871, c. 382, the Legislature put the system in force in all cities, and provided that it should be in force in towns upon its acceptance by their several town meetings.

In the practical application of the system, instances would occur in which the adjudication of land damages by the board which ordered the improvement would be unsatisfactory to the landowner. In such cases the damages might be so large as to more than equal the amount of any betterment assessment which could ultimately be made upon the owner, and the adjustment of the damages by the appellate tribunal might be made only after long litigation. By St. 1884, c. 226, the authorities empowered to locate, lay out, or construct streets, ways, or public parks were authorized, whenever they should take or purchase any land therefor, to make an agreement in writing with the owner that the city or town should assume any betterments assessed upon the remainder of his land, or any portion thereof, if he should in turn release upon such terms as might be agreed upon with them all claims for damages.

The authority given in this statute was used in the proceedings out of which grew the present petitions, and it is contended by the petitioners that the results are such as to make the assessment of betterments invalid, and require it to be quashed.

When an agreement is made under St. 1884, c. 226, while assessments are made upon all estates benefited, the assessment upon each owner with whom such an agreement has been made is not collected of him, but is assumed by the city or town. This leaves those owners only with whom no such agreement has been made to pay to the city or town a contribution to the cost of the improvement out of their special benefits, while they must further contribute in their general taxes to so much of the cost as is not met by the betterment assessments not assumed by the city or town. The results of such a system are unfair and unequal, unless in every instance in which such an agreement is made with a landowner its terms are such that in the release of his land damages the town or city gets an equivalent

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for its assumption of the betterment to be assessed upon his remaining land. If it does get such an equivalent, the town or city is not injured, and the landowners with whom no such agreements are made are not injured, for they are assessed no more than their ratable proportion of the cost of the improvement, and the aggregate of that cost is reduced by the release of the land damages of the owners with whom such agreements are made, which land damages would otherwise be included in the cost of the improvement.

While the effect of such an agreement, in which an equivalent for the assumption of the betterment assessment is given in the landowner's release of damages, injures neither the city or town nor those landowners whose betterment assessments must still be paid, if less than an equivalent is so given, both the city or town and those landowners who are still required to pay their betterment assessments are injured. Such landowners are injured because they are required to make a contribution out of their benefits, when others similarly affected by the improvement are not required to make ratable contributions, but lesser ones, equal only to their land damages, which in the case supposed are not an equivalent for their betterment assessments assumed by the municipality. The town or city is injured, because it gives up its right to collect the assessment which it assumes for less than an equivalent, and, instead of being reimbursed for the cost of the improvement by the owners of the lands specially benefited, must raise the loss by general taxation.

Another circumstance upon which the petitioners rely to defeat the assessment must be noticed in this connection. Agreements under St. 1884, c. 226, were made with many of the landowners, by which they agreed to contribute and pay to the city one third of the cost of construction, "being credited, however, with the betterments assessed on land of those abutters who do not sign this proposal," and further agreed to save the city harmless from damages which any owner who does not sign the offer may recover, "upon being subrogated to and credited with the betterments assessed or to be assessed by said city on such owners respectively." The expense upon which the assessment was based is an aggregate which has been arrived at not

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taking into account these so called contributions, although a large sum has been actually paid to the city on account of the agreements to contribute toward the cost of construction, and other large sums are due under these clauses of the agreements. The petitioners contend that the expense which is to be made the basis of an assessment of a betterment tax, where contributions by private persons are made to the city in aid of the public improvement, can be only the net expense to the city after deducting the amounts so contributed, and that, because no deduction has been made in the present instance, the basis of the assessment is wrong, and the tax invalid.

Assuming that this contention would be correct in a case where the contribution was a pure gift, we regard the contributions in the present case not as gifts, but as considerations entering into the agreements by which the contributing landowners released their damages, and the city assumed their betterment assessments, and which, in the judgment of the authorities who made the agreements, made the release of the damages and the promised contributions an equivalent to the assumption of the assessments by the city. So regarded, they ought not to be deducted as voluntary gifts in ascertaining the expense which is to be the basis of the betterment assessment, because they are in substance payments made by the landowners on account of what would otherwise be their betterment assessments. In place of receiving their land damages and paying their full betterment assessments, they release their damages and pay the difference between the amount of their damages and their asessments by paying a part of the cost of construction and a part of the land damages recovered by other owners, and the city receives no gift to lessen the expense which is the basis of the assessment. We think, therefore, that the question whether the expense which is to be the basis of the assessment was wrongly arrived at in not crediting these contributions because they were gifts does not arise in the present cases.

Recurring to the effect of the agreements made under St. 1884, c. 226, a majority of the court is of opinion that they should not be held to invalidate the assessment. If in any case there should be a corrupt agreement between a landowner

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and the authorities by which his assessment should be assumed by the city for no adequate consideration, or if by error of judgment a like result should follow, and in either case another landowner should show that he was thus made to contribute to the cost of an improvement when other landowners similarly affected were released from contribution, the assessment might well be quashed. But in the present case there is no allegation of fraud, and no allegation that the agreements under St. 1884, c. 226, were unfair or unjust, either as affecting the city or as causing the petitioners to be assessed sums which in the proper administration of the law they would not be called upon to pay. We are therefore to assume that all parties have acted honestly and fairly, and that the agreements cannot be successfully attacked as one-sided and unreasonably favorable to the landowners whose assessments have been assumed by the city. Taking the figures shown in the documents annexed to the return, computations may be made which apparently show that the city will pay from its general taxes a much greater sum for this improvement than if it had simply paid the land damages and collected all the betterment assessments. This may be explained by supposing that the original awards of land damages were far too low. However this may be, it is not shown that the petitioners are injuriously affected by the agreements made under St. 1884, c. 226.

The petitioners further contend that the assessment is invalid because under the agreements referred to the betterments assessed upon the other landowners are really assessed for the use, not of the city, but of the landowners who entered into the agreements. It is true that taxes cannot be laid by public authorities for the benefit of private persons; and if such were the operation of these agreements, the assessments would be invalid. But such is not their operation. The assessments not assumed by the city are to be paid to the city and to remain its property, like the proceeds of any other taxes.

The expressions in the agreements, that the other landowners are to be credited with the betterments assessed on land of those who do not sign the proposal, and that they are to save the city harmless from land damages upon being subrogated to and credited with the betterments assessed on the owners who may re-

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cover damages, are in effect mere limitations of the amounts which the promisors are to pay to equalize the assumption of their betterment assessments. The stipulation of the city is merely that amounts so to be ascertained shall be deducted from one third the cost of construction and the damages recovered in ascertaining what sum is due the city from the promisor under his agreement to release his land damages, in order to equalize that release with the assumption of his assessment by the city.

It is also contended that the assessment is invalid because the original order recited that the expense on which the assessment was based was $112,000, while the assessment amounted to a greater sum, $116,173. But the return shows that the original statement of the expense as $112,000 was a clerical error, afterwards amended by a new order striking out the $112,000 and substituting therefor $117,018, which was the actual expense. This amendment was properly made. *Chase* v. *Springfield*, 119 Mass. 556, 563. *Grace* v. *Newton Board of Health*, 135 Mass. 490, 498. *Foley* v. *Haverhill*, 144 Mass. 352, 355. Nor was it necessary to give any notice of the amendment. It appears by the cases cited that such an amendment might be made even after the hearing in court upon a petition for a writ of certiorari, and it follows that no earlier notice need be given. The proceeding by amendment was sufficient, and it was not necessary for the common council to reassess the betterment. If there had been a reassessment for the reason of this clerical error, the amounts assessed would have been the same, and even if the original assessment were void by reason of the error or for want of notice of the amendment, it would be no ground for quashing the assessment upon a writ of certiorari where relief is afforded only when necessary to prevent substantial injustice.

There are other more general considerations which, even if some error or injustice were shown, would justify the denial of relief to these petitioners by quashing the assessment. Under Pub. Sts. c. 51, § 6, parties aggrieved by such an assessment may apply to the Superior Court for a jury to reduce the assessment against them, and they may thus obtain relief if the expense which is the basis of the assessment is wrong, or a disproportionate valuation of their estates has been made. *Whiting*

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v. *Boston*, 106 Mass. 89, 97. *Prince* v. *Boston*, 111 Mass. 226, 232. *Fuller* v. *Somerville*, 136 Mass. 556. *Foley* v. *Haverhill*, 144 Mass. 352, 355. These petitioners do not attack the validity of the laying out of the way, which has been constructed at great expense and by which they are peculiarly benefited. They have made no contribution to its expense in respect of their peculiar benefits, but have been paid or are entitled to receive their land damages in full, while other parties similarly affected have contributed the damages to their lands. They have not been unaware that the work was being prosecuted under an expectation that betterments should be assessed. One of them was fully aware of all the details of the arrangements which it is now claimed invalidate the assessment,* and the other must be taken to have known of their general nature. Parties who lie by and permit great expenditures to be made, the benefits of which they will enjoy, are not to be allowed to avoid responsibility for the payment of any share of such expenditures by afterwards having the proceedings under which they were incurred quashed. *Whately* v. *County Commissioners*, 1 Met. 336. *Noyes* v. *Springfield*, 116 Mass. 87. *Grace* v. *Newton Board of Health*, 135 Mass. 490, 499.

In the opinion of a majority of the court, the order must be,

Petitions denied.

WILLIAM H. C. LAWRENCE, administrator, *vs.* WILLIAM H. HULL & others.

Suffolk. March 16, 17, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Unauthorized Use of Name in Partnership — Equity — Profits — Damages.

A., who, with three others, composed the firm of A., B., and Company, executed with them an instrument, by which he agreed to sell his interest to them, and they agreed "to make a copartnership contract, to commence on" a day named, "for the term of five years, under the firm name of" A., B., and Company, and he was to receive five promissory notes for a certain sum each, running one,

* This is shown by facts recited in the return.

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two, three, four, and five years from the beginning of the new partnership. On the day named for the formation of the new firm, A. executed another instrument, by which he sold to his former partners, "at this date constituting the firm of" A., B., and Company, "all my right, title, and interest to and in any and all things and property of whatsoever name or nature, in which I have an undivided interest with said" former partners, "as a member of the late firm of" A., B., and Company, "which copartnership expired by limitation on the" preceding day. *Held*, that a bill in equity, under Pub. Sts. c. 76, §§ 6, 7, to enjoin the use of A.'s name in the partnership business after the expiration of the five years, could be maintained; and that he was not entitled to recover profits, but was not limited necessarily to nominal damages.

BILL IN EQUITY, filed in the Superior Court March 10, 1896, under Pub. Sts. c. 76, §§ 6, 7, by the administrator of the estate of Andrew Lawrence, against William H. Hull, George B. Darrow, and Charles P. Dyer, "copartners doing business under the name of Lawrence, Wilde, and Company," to enjoin them from using in their business the name of the plaintiff's intestate, for damages, and for an account of the profits obtained from such use of his name. Hearing before *Dunbar*, J., who reserved the case for the consideration of this court; such decree to be entered as justice might require. The facts appear in the opinion.

H. Wheeler, for the plaintiff.

G. R. Nutter, for the defendants.

HOLMES, J. This is a bill in equity brought by the administrator of Andrew Lawrence, under Pub. Sts. c. 76, §§ 6, 7, to enjoin the defendants from using the name of Lawrence in their partnership name, which at present is Lawrence, Wilde, and Company. The defendants rely on two written instruments executed by Lawrence as constituting a consent in writing which satisfies the statute. The most important of them was executed by Lawrence to his three remaining partners on the date of his retiring from the firm of Lawrence, Wilde, and Company as then constituted. By it he sold to them, "at this date constituting the firm of Lawrence, Wilde, & Co., all my right, title, and interest to and in any and all things and property of whatsoever name or nature, in which I have an undivided interest with said Hull, Wilde, and Darrow, as a member of the late firm of Lawrence, Wilde, & Co., which copartnership expired by limitation on the 31st day of January, 1889." The words of conveyance are thought to carry the right to use the firm name by implica-

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tion. We are of opinion that they do not have that effect. The firm is contemplated as dissolved, and the conveyance is only of the property in which the former member of a now dissolved firm has an undivided interest after the dissolution with the other former members. But the statute gave each former member the whole and undivided interest in the use of his own name, and words could not have been framed more accurately to exclude a grant of that interest. It is true, however, that the earlier words, "at this date constituting the firm of Lawrence, Wilde, & Co.," do import a license of some sort to use that style for the partnership. But they do not purport to grant such a license; they import that in some way the license already exists. And this was the fact, as we find by referring to the other and earlier instrument. By that, while he was still a member of the firm, Lawrence agreed to sell out to his three other partners, and they agreed "to make a copartnership contract, to commence on the first day of February, A. D. 1889, for the term of five years, under the firm name of Lawrence, Wilde, & Co." This Lawrence assented to because he was a party to the instrument, and this was the only license the defendants or any of them ever had. It extended only for the five years contemplated by the agreement. With or without parol evidence, we can give the words no larger construction. It is to be noticed, as a confirmatory circumstance, that Lawrence was to receive five notes for ten thousand dollars each, running one, two, three, four, and five years from the beginning of the new partnership, and therefore was interested in its success for that time, but that after that he had no interest in it of any kind. Upon this construction of the document, it is unnecessary to advert to the fact that one of the three persons with whom Lawrence dealt has dropped out, and that a new person has been introduced into the firm. *Lodge* v. *Weld*, 139 Mass. 499.

We see no ground for giving the plaintiff profits. The plaintiff has not been competed with unfairly, and his loss bears no relation to the defendants' gains. He ought not to recover more than compensation for his loss, even if the reasoning of the Supreme Court of the United States should seem to suggest that possibility in patent cases. *Tilghman* v. *Proctor*, 125 U. S. 136, 148. Compare *Root* v. *Railway Co.* 105 U. S.

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189, 214, 215. On the other hand, there is nothing in the act inconsistent with the allowance of damages, or making an injunction the only remedy. Whether that is intended or not is a question of construction not much helped by generalities. See *Tilghman* v. *Proctor*, 125 U. S. 136, 144. But while we cannot say, as matter of law, that the damages are merely nominal, it is to be observed that neither he nor the estate which he represents has suffered beyond the infraction of a statutory right of prohibition. *Decree accordingly.*

FRANK L. TILTON, administrator, *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Berkshire. September 14, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, MORTON, & BARKER, JJ.

Loss of Life — Railroad — Grade Crossing — Due Care — Law and Fact.

Where the evidence in an action against a railroad corporation for causing the death of A., whose team collided with a train at a grade crossing, shows that the view of the track, in approaching it from a highway over a bridge, was more or less obstructed; that his son, who was fourteen years old and drove on this occasion, A. being blind but not deaf, both looked and listened for a train before entering upon the bridge, but saw and heard none; that when reaching the end of the bridge, twenty-two feet from the track, the son first saw the flagman, who was coming from his shanty between the bridge and the track with his flag furled, but who said nothing; that the son at once tried to stop his horse, but it went upon the track; and that he then heard the approaching train for the first time and struck the horse in order to get across, and the collision resulted, — it cannot be said, as matter of law, that there was no evidence of due care on the part of A. and his son.

TORT, in two counts, under Pub. Sts. c. 112, §§ 212, 213, by the administrator of the estate of Ralph Martin, for causing his death. At the trial in the Superior Court, before *Bishop*, J., the jury returned a verdict for the plaintiff on the first count, and for the defendant on the second count; and the defendant alleged exceptions. The facts appear in the opinion.

M. Wilcox, for the defendant.

J. F. Noxon, (*J. C. Crosby* with him,) for the plaintiff.

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FIELD, C. J. The only exception in the case is to the refusal of the court to rule that, on the evidence, the plaintiff was not entitled to recover upon either count of the declaration. The jury returned a verdict for the plaintiff on the first count, and for the defendant on the second. The first count was drawn under Pub. Sts. c. 112, § 212, and the second under § 213 of the same chapter. At the argument in this court it was not seriously contended by the counsel for the defendant that there was not some evidence for the jury that the flagman employed by the defendant at the crossing was grossly negligent or careless, and the remaining question is whether there was evidence for the jury that the plaintiff's intestate was "in the exercise of due diligence" at the time when he was injured. Martin, the plaintiff's intestate, at the time of the accident was fifty years of age and blind, but his hearing was good. He was being driven by his son, who was fourteen years of age, in a market wagon attached to one horse, the son being on the right hand of the seat and the father on the left. Martin the son was familiar with the crossing and knew that a flagman was stationed there. There was evidence that this crossing was on the main business street of the town of Adams, which had a population of from nine to ten thousand, and that there was "a great deal of travel across it." The accident occurred on December 13, 1895, in the daytime. The railroad ran nearly east and west, and the train was running from west to east. The father and son were travelling northerly on Centre Street. The son testified, as the exceptions recite, that when he "got to the L. L. Brown paper mill he got first sight of the crossing. Did n't known whether or not a train was expected at that time. Knew that a flagman had been located at this crossing before that time. There was no opportunity to see the railroad towards the west before they got to the L. L. Brown paper mill. Passing the paper mill, until witness got to the bridge, Mr. Jenks's house, barn, and bandstand and trees obstructed the view of the track to the west. Witness looked and listened for a train as he approached the bridge; looked both ways; looked for a flagman; heard nothing of a train until he got to the bridge and saw nothing; neither heard or saw anything of a flagman before he got to the bridge. There was a light team ahead, two people in it.

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The team was about the length of the bridge ahead of the witness. As witness was going on to the bridge the other team was just going off from the bridge on the other side. Up to that time witness had not seen or heard anything of a train, or any whistle or any bell; was listening for both. When the team ahead crossed the tracks, witness was going off from the north end of the bridge. First saw flagman when witness was off the north end of the bridge between the bridge and the track; flagman was just coming from the shanty; had a flag in his hand furled up; was unfurling it, I should think. Had not heard or seen anything of a train up to that time. When witness first saw the flagman he tried to stop his horse. Before he could stop the horse, it got upon the track. Had been driving about four miles an hour, on a sort of a dog trot. Before he could stop his horse, the horse got upon the track. When the horse was on the track he first heard the whistle of the train. Had not seen or heard anything of the train before that. He struck the horse and tried to get over as quick as he could. He did not back the horse off because he thought he could get over quicker than he could back off. The train was a very short distance away when it whistled. The flagman said nothing. Witness got some excited when he saw the train; train hit the hind wheel of the wagon. Witness struck the horse after he saw the train to get across. Witness's father was thrown out and killed as the result of the collision. Witness was thrown down the road, but was not hurt."

The bridge was an open iron bridge, supported by trusses on the sides above the floor, and was fifty or fifty-two feet long. The height of the girder above the floor of the bridge was six feet, and the depth of the girder about four and a half inches. The distance between the northerly end of the bridge and the southerly rail of the railroad, the rail nearest to the bridge, was twenty-two feet. There was a cattle guard one hundred and thirty feet westerly of the crossing, and a bank of earth twelve to fourteen feet high, westerly of the bridge, between the edge of the river and the southerly rail of the track. On this bank, beginning forty feet westerly of the cattle guard, there were nineteen or twenty elm trees from one to two feet in diameter, at different distances from the southerly rail of the track, vary-

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ing from sixteen to twenty-nine feet. These trees to a certain extent obstructed the view of the track by the son. On the space between the northerly end of the bridge and the railroad track, westerly of the highway, was the flagman's shanty, the dimensions of which were about six feet and three inches from east to west, seven feet and three inches from north to south, and it was from seven and a half to eight and a half feet in height. The train was running from twenty-two to twenty-five miles an hour.

Campbell, the engineer managing the train, on cross-examination testified as follows: "That he considered this crossing rather a dangerous crossing; that approaching this crossing as he did that day, he could n't see a team approaching the crossing from the south until the horse had got on to the south end of the bridge; there were buildings that prevented seeing any team beyond the south end of the bridge. After the horse's head got to the centre of the bridge and until his head passed by the west end of the shanty there was a certain amount of obstruction to my view of the horse. The trees and this shanty obstructed the view to a great degree, so that he lost sight of the team between the centre of the bridge and the west end of the shanty." There was much other testimony concerning the opportunity which the son had of seeing the train, both before he drove upon the bridge and while he was upon it, and the testimony concerning the conduct of the flagman was contradictory.

The argument of the defendant's counsel is, that if the son and the father had been in the "exercise of due diligence" the son either would have seen or heard the train before he got dangerously near to the track, or that the father would have heard it, and that if they neither saw nor heard it, it was their duty to stop at or near the northerly end of the bridge before driving upon the track. But taking the son's account of the position and conduct of the flagman as the son drove off the northerly end of the bridge to be true, as the jury may have found, and considering the obstruction to the sight of the train which the jury on the evidence may have found to have existed, although the case is a very close one, we are unable to say, as matter of law, that there was no evidence for the jury of the due care or diligence of the father and the son. *Randall* v. *Connecticut*

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River Railroad, 132 Mass. 269. *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57. *Hubbard* v. *Boston & Albany Railroad*, 162 Mass. 132. *Hicks* v. *New York, New Haven, & Hartford Railroad*, 164 Mass. 424. *Clark* v. *Boston & Maine Railroad*, 164 Mass. 434. *Conaty* v. *New York, New Haven, & Hartford Railroad*, 164 Mass. 572. *Exceptions overruled.*

PATRICK DALEY *vs.* CHARLES E. LEGATE & others.
JAMES BOWES *vs.* SAME.

Berkshire. September 14, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Mechanic's Lien — Auditor's Report — Labor performed under Subcontract off Premises — "Consent" of Owner — Right of Unpaid Employee.

If a case is referred in the Superior Court to an auditor to "hear the parties, examine their vouchers and evidence, and state the accounts, and make report thereof to the court, the finding of the auditor to be final on questions of fact," it will be inferred by this court, on appeal from the judgment of the Superior Court, that the parties intended that the auditor's report should be treated as an agreed statement of facts.

Where A. contracts with B. to furnish the materials and erect a building on his land, he will be held to have contemplated that B. might sublet a portion of his contract, and labor performed under a subcontract with C. to furnish the labor and materials required for the granite work is performed with A.'s consent.

It is not necessary, in order to establish a mechanic's lien, that the labor should have been performed on the premises where the building was being erected.

The fact that a subcontractor might not have had a mechanic's lien for the labor performed by a person in his employ, or that he has been paid for such labor, does not operate to prevent such person from maintaining a lien, if he has not received his pay therefor from his employer.

TWO PETITIONS to enforce mechanic's liens, under Pub. Sts. c. 191. In the Superior Court, the cases were referred to an auditor to "hear the parties, examine their vouchers and evidence, and state the accounts, and make report thereof to the court, the finding of the auditor to be final on questions of fact."

The auditor found and reported the following facts in the first case.

The petitioner had been employed by one D. J. Crowley for

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about two years before he did the work mentioned in this case. Crowley was engaged in stonework, so called, and carried on a yard at North Adams for doing such work for monumental and building purposes. The petitioner commenced work as an apprentice to learn the stonecutter's trade and received in addition to instruction at first $1 a day. Afterwards, as he became more skilful, his wages in money were advanced to $1.50 a day, then to $2 a day, and finally to $2.50 a day, the price that he was to receive from Crowley when he did the work for which he seeks pay in this case. He was employed to do any work that should be given him by Crowley, in the yard or away from the yard, in the erection of buildings or placing of monuments. His employment contemplated no particular kind of work, except that it was to be work in Crowley's business and line, namely, that of stonecutting. He testified that he believed nearly all of the work for which he charged in this case, and which was done in Crowley's yard, was done on materials intended to be used and actually used in the erection of the respondents' building, and that he knew the materials were to be so used when he did the work upon them. This work consisted in dressing the rough stone into forms expressly designed and made according to plans for use on said building. The petitioner admitted that he had done some work during the time in other places and on other materials than those used in the respondents' building, but claimed that the amount of such other work was very little.

The petitioner also testified that he had done three days' work on the respondents' building, these three days being a part of the twenty-five days charged in his petition. He had been paid $5.66 towards this work, and it did not appear that he had credited this amount except generally on his account. No evidence was offered as to the actual value of the plaintiff's services.

The respondents had contracted with one Fleming to furnish the materials and build a block on their lot in Adams, described in the petition, and Fleming sublet to Crowley the granite-work on the building for a round price for materials and labor, Crowley agreeing to "cut all granite in buildings and set same in place above cellar wall." Crowley had been fully paid by

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Fleming for all work and materials furnished by Crowley under his contract, Fleming having, as the last payment, accepted an order in writing given by Crowley, which order covered the amount due Crowley for all work done by the petitioner, as well as for other work of Crowley's hands on the job.

It was agreed that the petitioner had filed a statement in the registry of deeds within thirty days after he ceased to labor, and had done all things necessary to establish a lien for the wages due him, if he was entitled to such lien; and that Crowley was insolvent and had not paid the petitioner for the services charged in his petition.

The facts in the second case did not differ materially from those in the first case.

The auditor stated the account in each case, and referred to the court the question of the right of the petitioner to maintain a lien on the building and lot described in his petition.

Maynard, J. found for the petitioner in each case, and ordered judgment accordingly; and the respondents appealed to this court.

F. R. Shaw, (*H. L. Harrington* with him,) for the respondents.

C. T. Phelps, for the petitioners.

MORTON, J. The facts in these two cases are very much alike, and they were argued together. At the argument the petitioner in each case moved that the appeal be dismissed and the judgment affirmed, on the ground that the appeal had not been entered in this court within a reasonable time, as required by statute. Pub. Sts. c. 153, § 15. The motion was dismissed in each case, it appearing that there was a reasonable excuse for the delay.

The cases were referred in the Superior Court to an auditor to "hear the parties, examine their vouchers and evidence, and state the accounts, and make report thereof to the court, the finding of the auditor to be final on questions of fact." There was no agreement, except as may be inferred from the auditor's rule, that the auditor's report was to be regarded as a case stated or as an agreed statement of facts. In the absence of such an agreement, it is doubtful, to say the least, whether an appeal would lie from the judgment of the Superior Court. *Hutchinson* v. *Tucker*, 121 Mass. 402. *Chapman* v. *Briggs Iron Co.* 6 Gray,

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330. But, in view of the fact, that the stipulation in the auditor's rule that his findings should "be final on questions of fact" could not have been inserted except by agreement of parties, we think that the fair inference is that they intended that the auditor's reports should be treated as agreed statements of facts, and accordingly we proceed to consider the cases.

The respondents contracted with one Fleming to furnish the materials and build a block on their lot. Fleming in turn contracted with one Crowley for a round sum to furnish the labor and materials required for the granite work. Both of the petitioners were in Crowley's employ, and both worked in his yard on materials intended to be used and actually used in the erection of the respondents' building, and knowing at the time that the materials were to be so used. In Daley's case it further appears that there was evidence tending to show that the "work consisted in dressing the rough stone into forms expressly designed and made according to plans for use on said building," and that he worked three days on the building itself, which are included in the labor for which he seeks to establish a lien.

We think that the respondents must be held to have contemplated that Fleming might sublet a portion of his contract, and that therefore the labor performed by the petitioners was performed with their consent. *Parker* v. *Bell*, 7 Gray, 429. *Hilton* v. *Merrill*, 106 Mass. 528. *Beatty* v. *Parker*, 141 Mass. 523. It was not necessary in order to entitle the petitioners to liens that the labor should have been performed on the premises where the building was in the process of erection. "Under certain circumstances, a lien may be established for work done, away from the premises, in the construction of a building." *Webster* v. *Real Estate Improvement Co.* 140 Mass. 526. *Wilson* v. *Sleeper*, 131 Mass. 177. *Jones* v. *Keen*, 115 Mass. 170, 185. *Weeks* v. *Walcott*, 15 Gray, 54. *Dewing* v. *Wilbraham Congregational Society*, 13 Gray, 414. *Clark* v. *Kingsley*, 8 Allen, 543.

The cases of *Tracy* v. *Wetherell*, 165 Mass. 113, *Eisnor* v. *Dinand*, 165 Mass. 116, note, and *Donaher* v. *Boston*, 126 Mass. 309, are distinguishable. In those cases it was held that subcontractors who had agreed to furnish materials wrought to a stipulated condition which they might have procured elsewhere had no lien for the labor expended in preparing such material, be-

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cause their contracts were for materials and not for labor and materials, or were for the sale of finished articles of merchandise at a fixed price to the contractor. Those cases would have more nearly resembled these if Crowley had been the petitioner seeking to maintain a lien for the labor furnished in preparing the granite for the use to which it was put. As they stand they are cases in which the petitioners seek to establish liens for labor, performed under circumstances which imply the consent of the respondents, "on material which was designated as intended for use in the buildings on the premises, and was in fact so used," (*Wilson* v. *Sleeper*, *ubi supra*,) and was not adapted to or available for general use or sale in the market. The fact that Crowley might not have had any lien for the labor for which the petitioners seek to maintain liens, or that he has been paid for such labor, does not operate to prevent them from maintaining liens. *Bowen* v. *Phinney*, 162 Mass. 593. *Atwood* v. *Williams*, 40 Maine, 409.

It is to be observed that, according to Crowley's contract with Fleming, he was to "cut all granite in buildings and set same in place above cellar wall"; so that by the very terms of his contract Crowley was to furnish labor and material for the erection of the respondents' buildings, and not merely finished articles of merchandise to Fleming the contractor.

Though it is said of Daley that he commenced work in Crowley's yard as an apprentice, there is nothing to show that, either at the time when he performed the labor for which he seeks to establish a lien, or at any other time, he was not entitled to the wages which Crowley agreed to pay him in addition to the instruction which he received.

We assume that the $5.66 which the auditor finds was paid Daley on account of the three days' work which he did on the buildings has been properly credited.

The result is that in each case we think that the judgment should be affirmed, and it is

So ordered.

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NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY *vs.* CHARLES B. BENEDICT.

Berkshire. September 14, 15, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Boundary — Evidence — Ancient Deed — Abandonment of Easement.

At the hearing of a suit in equity, if the boundary line between the railroad location of the plaintiff's lessor and the defendant's premises on the west is in dispute, a copy of the record in the registry of deeds of an instrument signed, sealed, and acknowledged in 1849, by the defendant's predecessors in title, reciting their "occupancy of premises owned by the" railroad corporation, "particularly those premises situated westerly of the stores and buildings of ours," and disclaiming all right and title "to premises or land of said company which we now occupy or may hereafter occupy, . . . and now admit that the stone walls or underpinning on which our buildings stand is the westerly line of our premises," although not formally running to the corporation, is admissible in evidence.

Non-user by A. of an easement, accompanied by open and adverse occupation for more than fifty years by B. and his successor, under a claim of title, with a recognition on A.'s part that such claim is well founded, shown by his acceptance and recording of an instrument executed by B., who disclaims therein title to land of A. beyond a line, which line includes the land subject to the easement, and the absence during such period of any claim by A. and his successor of title to or an easement over any portion of the land, will warrant a finding, in a suit by A.'s successor to restrain an alleged trespass by B.'s successor, that the easement has been abandoned.

BILL IN EQUITY, filed in the Superior Court, May 21, 1897, to restrain an alleged trespass upon certain land in Great Barrington, which the plaintiff averred that it was entitled to use and occupy for railroad purposes. The answer alleged that the defendant was the owner in fee of the land, upon which he was excavating the soil and laying the foundation for the erection of a building thereon. A temporary injunction was granted, and the case was referred to a master, who found and reported the following facts.

The land occupied and claimed by the defendant consists of a parcel about seventy feet long north and south, and thirty-two feet wide east and west, situated on the easterly side of the plaintiff's railroad, and immediately south of land used by the

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plaintiff for depot purposes in Great Barrington. The defendant claims title by virtue of certain deeds of conveyance from Silas Sprague, and intermediate conveyances to himself.

The plaintiff claims that a portion of the premises along the westerly side of the same, measuring six feet wide at the south end and eight feet wide at the north end, is covered by and included in the description of land taken by the Berkshire Railroad Company (the plaintiff's lessor) for depot purposes.

On September 3, 1841, the Berkshire Railroad Company, a corporation duly organized by law under a charter granted in 1837, filed with the county commissioners of Berkshire a petition for the assessment of damages for the taking of certain lands therein described for railroad purposes in Great Barrington; and on September 29, 1841, the corporation filed with the commissioners an amendment to its petition, describing therein certain other lands which it had taken for depot purposes adjoining land described in its petition. The commissioners thereafter duly assessed damages for the taking of all of the land described in both the petition and the amendment thereto.

These descriptions so filed state the distances and courses of the centre line of the roadway and the width of land taken extending each way from the centre line, but they do not define or refer to boundaries, and no map or plan is referred to therein. "I find that the land described in the above mentioned amended description covers and includes a portion of the premises claimed and occupied by the defendant, which portion extends over and along its westerly side, and is three and three tenths feet wide at the south end and five feet wide at the north end. I find that the true centre line of said roadway as described by the petition filed by said railroad company is located to the west of the premises claimed by the defendant, and is distant from the western line of the same twenty-two and forty-seven one-hundredths feet at its south end and twenty-two and ninety one-hundredths feet at its north end." On May 19, 1843, one Silas Sprague gave a warranty deed, describing and purporting to convey the premises now claimed and occupied by the defendant to Gilbert L. Granger and others, from whom, by mesne conveyances, the premises came to the defendant, who was in possession of the same at the time of the bringing of this

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suit. The defendant and his predecessors in title had continuously occupied and used the whole of the premises openly and adversely, claiming title thereto, from the date of the conveyance of Sprague to Granger and others, up to the commencement of this suit. During most of that period the premises were entirely covered by buildings erected thereon, standing upon stone foundations, the outside face of which came even with the boundary lines of the land. On March 21, 1844, Sprague gave the Berkshire Railroad Company a warranty deed, describing and purporting to convey to the corporation in fee all the land included in the description of its location across the premises of Sprague (a portion of which is that part of the tract claimed by the defendant covered by the location as above stated), and also other land adjoining thereto, now used by the plaintiff for depot purposes. About October 11, 1896, the buildings standing upon the land claimed by the defendant were destroyed by fire, and he was proceeding and intending to rebuild upon the same foundation at the time he was enjoined therefrom by the proceedings in this case. No evidence was introduced tending to show that either the Berkshire Railroad Company or its lessee, the plaintiff, ever claimed title to or an easement over any portion of the premises occupied by the defendant and his grantors until subsequently to the burning of the buildings thereon, as above stated. It was agreed by the parties that the plaintiff is the lessee of the Berkshire Railroad Company, and entitled to all lands, rights, easements, and franchises belonging to the lessor, or to which the lessor was legally entitled at the time of the execution of the lease.

It was agreed that the records of the county commissioners of Berkshire show that the Berkshire Railroad Company filed with the county commissioners on December 1, 1840, the time named in their charter, a survey and location of their railroad, with maps of the same; that the survey commences at a monument standing in the line separating the States of Massachusetts and Connecticut, this being the southern terminus of this railroad, and then runs, giving courses and distances, to a point in the town of West Stockbridge, being the northern terminus of the railroad; that the survey mentions no boundaries of the route, but that three maps were filed accompanying the survey; that

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no such maps are now on file, and there is no evidence whether they have been on file since December 1, 1840, except what appears in the records, and there is evidence that they have not been on file during at least forty years last past; that on May 18, 1841, and June 7, 1841, petitions were filed amending the location as filed December 1, 1840; and that when, on September 3, 1841, the railroad company filed a petition for the assessment of damages, the lands petitioned for were described with reference only to the centre line of the railroad and the boundary lines of adjoining landowners, and the centre line was described in courses and distances, but without reference to boundaries or to any map or plan, except as above stated.

A copy of the record in the registry of deeds of the following instrument, dated April 3, 1849, and signed, sealed, and acknowledged by G. L. Granger, Henry L. Hill, and Rodney Hill, was admitted in evidence, against the plaintiff's objection: "Whereas our own convenience *indues* [*sic*] the use and occupancy of premises owned by the Berkshire Railroad Company, particularly those premises situated westerly of the stores and buildings of ours erected on Railroad Street in Great Barrington; Now therefore, Be it known that we, the subscribers, do for ourselves, our heirs, and others claiming from or under us or either of us, hereby disclaim all right, title, or demand to premises or land of said company which we now occupy of may hereafter occupy as aforesaid, by the permission or non-objection of the officers or stockholders of said railroad, and now admit that the stone walls or underpinning on which our buildings stand, is the westerly line of our premises as purchased of Silas Sprague."

Hearing before *Maynard*, J., who admitted in evidence the paper above set forth, against the plaintiff's exception, found, upon the facts stated in the master's report, that whatever easement, if any, the plaintiff or its lessor gained, by its taking as shown by the record of location, if not merged in its deed, was abandoned by the plaintiff; that the defendant had gained title to the land in dispute by prescription; ordered the injunction dissolved and the bill dismissed; and reported the case for the determination of this court.

If the findings and the ruling admitting in evidence the paper

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excepted to were right, the judgment was to be affirmed; otherwise, such entry was to be made as law and justice require.

A. C. Collins, for the plaintiff.

H. C. Joyner, (*O. C. Bidwell* with him,) for the defendant.

ALLEN, J. The copy of the record of the deed or paper executed in 1849 by the defendant's predecessors in title was competent. Although not formally running to the Berkshire Railroad Company, there can be no doubt that that company was in reality the other party to it. The disclaimer of right and title up to the walls of the buildings was for the benefit of the railroad company, and nobody except the railroad company, so far as appears, had any interest in the subject to which the paper related. It was obviously designed to affect the title to the land, and to define the boundary line, and therefore was an instrument which it was proper to record in the registry of deeds. A deed more than thirty years old, if produced from the proper custody, requires no formal proof; and in this Commonwealth an office copy of an ancient recorded deed may be admitted in evidence as if it were the original deed. *Stetson* v. *Gulliver*, 2 Cush. 494, 498. *Commonwealth* v. *Emery*, 2 Gray, 80. *Thacher* v. *Phinney*, 7 Allen, 146. *Samuels* v. *Borrowscale*, 104 Mass. 207. *Boston* v. *Richardson*, 105 Mass. 351, 371, 372.

This paper had a tendency to show that the signers were the owners of buildings adjacent to the railroad, on the east side thereof, and that they were in the use and occupancy of some land to the west of their buildings; and they thereupon signed this formal paper, which was under seal and acknowledged, for the purpose of showing that such use and occupation were by the permission of the railroad company, and that they admitted that the stone walls on which their buildings stood showed the westerly line of their premises. If the railroad company accepted this paper and put it on record, it had some tendency to show that it made no claim to the land under the foundation walls of the buildings, and that an agreement was then had as to the true boundary line. In point of fact, according to the report of the master, the location of the railroad extended a little farther to the east, and included a strip of land under the buildings, three and three tenths feet wide at the south end, and five feet wide at the north end. But the location was made in such

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form that its outside lines might not be well understood, and in 1843 the owner of the adjoining land on the east gave a deed to the defendant's predecessors which included this narrow strip now in controversy. Occupation followed, and buildings were soon erected covering said strip of land, and for fifty-three years after the date of the deed the grantees and their successors continuously occupied and used the same openly and adversely, claiming title thereto, and there was nothing to show that the Berkshire Railroad Company or its lessee (the present plaintiff) ever claimed title to or an easement over any portion thereof, until after October 11, 1896. From this evidence an abandonment of the easement might be found. It is not a case of mere non-user of the easement, but of non-user accompanied by adverse occupation under claim of title, with a recognition on the part of the railroad company that such claim of title was well founded, as shown by its acceptance of the instrument of 1849. An intention to make no claim to a right of way over the strip of land in dispute might therefore be found. *Westcott* v. *New York & New England Railroad*, 152 Mass. 465, and cases there cited. *Bicknell* v. *New York & New England Railroad*, 161 Mass. 428.

There might be a difficulty in establishing the defendant's asserted title by prescription, by reason of St. 1861, c. 100, and later statutes; but this does not affect the finding on the ground of abandonment. *Judgment affirmed.*

PETER RYAN *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Berkshire. September 15, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Personal Injuries — Railroad — Assumption of Risk — Action.

If a brakeman on a night freight train, who often has gone over the route by night, is injured, while descending from a moving car in the discharge of his duties, by coming in contact with a fence three feet and nine and one half inches from

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the nearest rail of the track and built on top of a retaining wall running parallel to and within the original survey of the railroad, he cannot maintain an action against the corporation for his injuries.

TORT, for personal injuries occasioned to the plaintiff while in the employ of the defendant as a brakeman. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions, in substance as follows.

The evidence showed, and it was admitted, that on March 10, 1893, the plaintiff was in the employ of the defendant on that portion of the defendant's railroad known as the Danbury and Norwalk Division in the capacity of head brakeman on the "night freight," so called, which ran from Danbury to Wilson's Point, beyond South Norwalk in the State of Connecticut; that on that day the train left Danbury at about 7.30 P. M. and reached Norwalk a little after nine o'clock; that at Norwalk the train picked up one or more cars, and left soon after for South Norwalk; that there was between Norwalk and South Norwalk a side track on the easterly side of the main track, called the "dock siding"; that on that night the conductor had orders to put his train on the siding; that southerly of the switch leading to the siding there is an up grade to the main track for some distance, so that cars cut off from the engine will run in on the siding of their own motion; that it was the intention of the conductor to put his train on the siding by cutting off the cars behind the engine; that southerly of the siding Ann Street crosses the main track from east to west, and southerly of Ann Street and beginning at the crossing, there is a bank or retaining wall extending along the easterly side of the main track, north and south, for about one hundred feet, varying in height from two feet and four inches at the end by the crossing to four feet and nine and one half inches at the southerly end; that on top of the wall, beginning at the southerly end thereof, was a part of an old picket fence running along the wall some nine feet towards the north, the wall and fence being within the limits of the original survey of the railroad, but there was no evidence that they were constructed or maintained by the defendant; that on the night in question, in order to get the train over the switch leading to the siding, the engine was run up to and opposite the fence; and that the plaintiff, at a point opposite the fence, received the injuries complained of.

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The plaintiff testified, among other things, as follows: "Some time in November, 1892, I commenced to run as a brakeman on the night freight. I ran on this train every night except Sundays, up to March 10, 1893, and I never ran on any other train over that division. We left Norwalk for South Norwalk with eighteen cars behind the engine, and the two cars in front of the engine. At Norwalk I received orders from the conductor to cut off the train at the "dock siding." He told me they would cut off the buggy on the main track, pull the train down over the switch, then I was to get down and pull the pin behind the engine. I rode as it was my duty to do, being head brakeman, on the cars in front of the engine. They cut off the buggy on the main track, pulled down over the switch and I received the signal to cut off behind the engine. After I received the signal, I got down off the rear end of the car, which was the car next in front of the engine, by a ladder which is in the centre of the end of the car, on to a platform which extends along the end of the car. I then moved along this platform to the left hand corner, reached around this corner, took hold of a handle or grab iron on the side of the car, placed my left foot on a little step something like a horse shoe on the side of the car, then swung around the corner, intending to put my right foot into a loop or stirrup step under the car and to then drop down on the ground. As I swung around the corner to put my right foot in the step, I was struck in the left side by a stringer of a picket fence which stood on top of a wall beside the track, knocked off the car, fell on my hip on the wall, and from the wall fell forward upon the track, my right arm falling across the rail in front of one of the driving wheels. The driving wheel went over my arm and crushed it so that it was amputated that night, and the connecting rod struck me in the back. After I got out of the hospital, I went to the place where I was injured, and I found the picket fence leaning over towards the track, I should think three or four inches. I went there again some time after, and I found the fence had been straightened back even with the wall. The post was decayed at the bottom, and a wedge had been driven down beside it. I had never been over the railroad from Danbury to South Norwalk in the daytime, and had never seen that fence or wall before. Only once before, so far as I can

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recollect, have I helped to put a train on that siding; there were at that time no cars in front of the engine; I was brakeman on the car next behind the engine, and we did not run down so far south of the switch as we did the night I was injured. I got off the car in the usual way. There is no printed rule as to which side you are to get off when the train stands on a curve. When the train stands on a curve and you have occasion to look back, an experienced man would get off on the inside of the curve so he could see the men back of him."

On cross-examination the plaintiff testified that he never noticed an electric light near the place of the accident.

William B. Palmer testified that he was a civil engineer and surveyor, and had made a survey and plan of the track, fence, and wall where the plaintiff was injured; that the fence was an old one and in a dilapidated condition; that the pickets were off and the stringers stuck out beyond the post; and that the distance from the face of the stringers to the nearest rail was three feet and nine and one half inches.

Ward Miller, who was a brakeman on the train when the plaintiff was injured, and John F. Keeler, who was formerly employed by the defendant as a fireman on this division of its railroad, both testified that the fence leaned over the wall; and the former witness also testified that he had never noticed an electric light near the place of the accident.

John Kilcourse, called as a witness by the defendant, testified that he had been road master for the defendant on this division for nine years; that he had never noticed that the fence leaned over the wall, and had made no changes in the fence since the accident; and that there was an electric light on Ann Street, near the place of the accident, but he could not say that it was lighted.

Albert C. Weiler testified for the defendant that he was the conductor on the train in question, and was familiar with the place of the accident; and that there was an electric light on Ann Street about 125 to 150 feet from the fence, and it was lighted on that night.

At the close of the evidence, the judge, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

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C. E. Hibbard & J. C. Chamberlain (of Connecticut), for the plaintiff.

A. C. Collins, for the defendant.

HOLMES, J. The fence which the plaintiff struck was a permanent visible structure, and under our decisions did not constitute one of those unusual dangers to which an employee who has not taken the risk of them with actual knowledge of their existence has a right to assume that he will not be exposed by entering an employment. It was not near enough to the track for that. It was three feet and nine and one half inches from the nearest rail. In *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79, the obstruction was a little nearer the track, and the plaintiff had no actual knowledge of it. If opportunity to observe the danger be material, the plaintiff had had chance enough to do so. *Bell* v. *New York, New Haven, & Hartford Railroad*, 168 Mass. 443, and cases cited. *Exceptions overruled.*

GEORGE E. HARRIS *vs.* INHABITANTS OF GREAT BARRINGTON.

ELIZABETH W. KILBOURNE *vs.* SAME.

Berkshire. September 15, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Personal Injuries — Defective Highway — Due Care — Absence of Railing — Law and Fact.

In an action against a town for personal injuries occasioned to the plaintiff by an alleged defect in a highway while driving thereon, he testified that, hearing a team coming behind him, he turned to the right side of the travelled part of the way to let it pass; that his horse, which was a gentle one, shied at something, sprang back, and jumped off the road into a ditch at the side; and that, seeing that his wagon was likely to upset, he turned the horse short across the ditch so as to go off straight and not sideways. *Held*, that it was for the jury to say whether, if there was any loss of control of the horse, it was or was not momentary, and whether the plaintiff was in the exercise of due care.

If the wrought part of a highway is seventeen feet wide from shoulder to shoulder, having a ditch three feet deep descending from the roadbed at an angle of about forty-five degrees, and the space between the travelled part of the way and the shoulder where the slope of the ditch begins is not more than six or

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eight inches wide, the way is not defective by reason of its narrowness; but, in an action against the town for personal injuries occasioned to a traveller on the way, it cannot be said, as matter of law, that there was not evidence for the jury that the way was defective for want of a sufficient railing.

TWO ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs, respectively, by an alleged defect in a highway in the defendant town. The cases were tried together in the Superior Court, before *Bishop*, J., who, after a verdict for the plaintiff in each case, reported them for the determination of this court. If the plaintiffs could not maintain their actions, the verdicts were to be set aside and new trials ordered; otherwise, judgment was to be entered on the verdicts. The facts appear in the opinion.

H. C. Joyner & A. C. Collins, for the defendant.

J. C. Crosby & J. F. Noxon, for the plaintiffs.

FIELD, C. J. These two cases come before us on the report of the justice presiding at the trial. A plan and photographs of the place of the accident were submitted to the jury, and produced before us at the argument, and all the material evidence on the question of the liability of the defendant town was reported. The report states the case as it appeared from the evidence as follows:

"These are actions of tort to recover damages for personal injuries to the plaintiffs while driving upon a highway in the town of Great Barrington on November 2, 1896. Both cases were tried with a jury. The jury took a view of the highway where the accident took place. It was admitted that the highway was a public highway, for the condition of which the defendant was responsible, and that the defendant received due notice of the time, place, and cause of the injuries.

"The pleadings may be referred to. On the trial, the testimony of both plaintiffs and defendant showed, and it is admitted, that on the second day of November, 1896, between two and three o'clock in the afternoon, the plaintiffs, who are brother and sister, were driving together from their home in the adjoining town of Egremont to the village of Great Barrington. They were in a market wagon, were carrying a barrel of apples, and were driving a single horse.

"While driving upon a portion of the highway which was

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perfectly smooth and free from stones or obstructions, the plaintiff Harris, who was driving, heard a team coming behind him and looked back to see who it was; he then turned to the right side of the travelled part of the highway to let it pass; and while driving on said right side his horse suddenly went off into the ditch. The plaintiff Harris was thrown out on the right hand side of the wagon and was injured, and Mrs. Kilbourne tried to jump out on the left side of the wagon and struck on her feet and knees and was injured. The wagon was not upset, but the plaintiff, seeing it was likely to upset, turned his horse short across the ditch and the horse stopped after going into the ditch. The highway where the accident occurred is one that has a large amount of travel upon it. The plaintiffs were perfectly familiar with it, and had often driven over it. The evidence of the plaintiffs was that the horse was a gentle and proper animal, and there was no evidence to the contrary.

"The plaintiff introduced evidence tending to show that at the place of the accident the road as constructed was seventeen and eight tenths feet wide from shoulder to shoulder, and that deep ditches descended from the sides at an angle of about forty-five degrees; that the depth of the ditch on the side where the accident occurred was three and a quarter feet from the highest point of the road-bed; that the travelled part of the road-bed came within a few inches of the shoulders of the road where the ditches began, and that there was no railing; and claimed that the narrow roadway, deep ditch with a sharp descent near to the travelled way, without railing or guard, constituted a defect which due care on the part of the town should have prevented, and that the town could have prevented the same by making the slope of the bank more gradual, or by a railing. The width of the highway between fences was fifty-nine feet.

"The defendant introduced evidence tending to show that the soil under and adjoining the highway was of clay, and had a tendency to hold water; that many years ago it was almost impassable at certain seasons of the year, especially for loaded teams, on account of the mire; that in 1871 the roadway was raised or turnpiked with ditches on each side to drain off the

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water, and has been maintained in about the same condition to the present time, except that it is not quite so rounding as when first constructed. It has been scraped and gravelled from time to time, and about four years prior to the accident the selectmen put stones in the centre of a section of the road where there was a 'clay-hole' or springy place, and covered them with gravel; that as now constructed the travelled part of the road was seventeen feet in width at the place of the accident, with a margin of grass on each side a few inches in width, and the road-bed smooth and free from obstructions, and only slightly rounded.

"The defendant claimed that, if the town maintained a highway in which the travelled portion was of the width shown in the evidence, level, smooth, and free from obstructions, and with shoulders a few inches in width, and a ditch upon each side about three feet in depth, and the evidence showed that the ditches were not deeper than was necessary to properly drain the road-bed, the underlying soil of which was of clay and liable to hold water, and so make the travelling difficult at certain seasons of the year, the highway cannot be said to be defective."

At the conclusion of the evidence, the defendant in each case requested the court to rule that, upon all the evidence, the plaintiff could not recover, which the court refused to do, and submitted the cases to the jury, under instructions not excepted to, and the jury in each case found for the plaintiff. This refusal raises the only questions of law to be considered, and they are whether there was evidence for the jury that the plaintiffs respectively were in the exercise of due care at the time when they were injured, and also evidence that they were injured by reason of "a defect or want of repair, or of sufficient railing, in or upon" the highway, which might have been remedied by reasonable care and diligence on the part of the town, and which rendered the highway not "reasonably safe and convenient for travellers." Pub. Sts. c. 52, §§ 1, 18.

A part of the testimony of George E. Harris, who was driving the horse at the time, is as follows: "I was driving from Egremont into Barrington; I got along as far as between Mr. Kerner's and Mr. Taylor's farm-house; I think about midway,

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and there was a team coming up behind me and I turned out to the right to let them pass. I had a barrel of apples in, and a heavy wagon; and as I turned out he started to go by, I think; I don't know whether or just how it was; but just as I got inside and turned out for him to go by, my horse saw something, I don't know what, and shied and jumped off of this bank into the ditch; and of course it threw us out, and I had a barrel of apples in, and I suppose that fell on me, struck me on the head and breast."

He also testified that "there was probably a foot and one half or two feet to the ditch" from the wheels next to the bank where he had turned out, and that "the horse jumped right off; sprung back and went right square off"; that the horse "was on a walk; might have been on a little jog"; that he was well in hand, and was an "ordinary, gentle horse"; that when "I saw that I had got to go off of that place, . . . I fetched the horse around all I could, so as to go straight off"; and that "I thought perhaps if I done that I would n't upset. I knew if I went off sideways I would go over then anyways. So I thought if I went off square I would save myself."

On this evidence it was for the jury to say whether, if there was any loss of control of the horse, it was or was not momentary, and whether, under the circumstances, the plaintiff Harris did or did not exercise due care. *Hinckley* v. *Somerset*, 145 Mass. 326.

We are of opinion that the highway was not defective by reason of the narrowness of the wrought or travelled part of it, which seems to have been wide enough, but we think that the plaintiffs might properly contend that the space between the travelled part of the road and the shoulder where the slope of the ditch began was too narrow, the space being at most not more than six or eight inches wide; that the slope was too steep, being at an angle of about forty-five degrees with the road-bed, and that the ditch was too deep, being about three feet deep. We cannot say, as matter of law, that these facts were not evidence for the jury that the highway was defective for want of a sufficient railing. Whether a highway is reasonably safe and convenient for travellers, or is defective, is ordinarily a question of fact for the jury. What the test as

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matter of law is has been recently considered by this court in *Scannal* v. *Cambridge*, 163 Mass. 91, and in *Tisdale* v. *Bridgewater*, 167 Mass. 248. In the present cases we cannot say, as matter of law, that there was not sufficient evidence to be submitted to the jury that the highway was defective.

Judgment on the verdicts.

ROSETTA W. FORD *vs.* HEMAN L. TICKNOR.

Berkshire. September 15, 1897. — October 20, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Will — Life Estate or Fee — Partition of Real Estate — Bona Fide Purchaser without Notice.

E., who was tenant in common of land with his wife R., and who died in 1880, gave her by will his entire estate "to hold to her during her lifetime, with full power to use and dispose of the same as she shall deem right and proper. And after the decease of the said R., I give, devise, and bequeath all the remainder of my said estate to my son, W., to hold to him, his heirs and assigns forever." W., who died in 1893 intestate, left a widow, M., and no issue living, and no real estate except that in controversy, the value of which did not exceed $5,000. R., who died in 1896, gave by will, after a small legacy, the residue of her estate "to my brother H. . . . and his heirs forever." M., having brought a petition for partition against H., who died while the proceedings were pending, T. suggested H.'s death, claiming that H. had conveyed to him the premises, and he was admitted a party defendant. It appeared that T. acted for another, that he had notice of the true state of the title, and that H. and the person for whom T. acted knew all the facts. *Held*, that the power of disposal in R. did not extend to a disposal by will, that a certain deed given by her in 1890 was not an exercise of the power as it was never delivered, that the grantee of H. was his agent and not a *bona fide* purchaser without notice, and that the judgment for partition by the Superior Court should be affirmed.

PETITION to the Probate Court, for partition of land in Great Barrington, removed into the Superior Court. Trial without a jury, before *Bishop*, J., who entered a decree for partition as prayed for, and reported the case for the determination of this court, in substance as follows.

The property which formerly belonged to Horace Ticknor descended on his death, in 1861, to his four children, in equal

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shares. By deed dated February 7, 1862, two of the children conveyed their shares to the other two, viz. to Roselia M. Ford (the wife of Enos Ford hereinafter mentioned) and Morton H. Ticknor, each being thereafterwards seised of one undivided half of the premises as tenants in common. On July 19, 1864, Morton H. Ticknor executed a deed of all his right in and title to the premises, which deed as recorded ran to Enos Ford as the grantee. This deed was for the most part in the handwriting of an attorney, and was witnessed by the attorney and one Seeley. As originally written, the deed was wholly in the handwriting of the attorney, and ran to Roselia M. Ford, wife of Enos Ford, as grantee, and that it was so signed and acknowledged. Between the time of the signing and acknowledgment of the deed and the time of placing it on record the deed was changed by erasing the name of Roselia M. Ford in the grant, habendum, and covenants and by inserting the name of Enos Ford; and the words written into the deed to effect this change were in the handwriting of Seeley. The judge found as a fact that they were written in and the erasures made after the deed was signed and acknowledged, and before it was delivered, and that this was done with the assent of Morton H. Ticknor, Roselia M. Ford, and Enos Ford, and for the purpose and intent on the part of said persons to change the paper so that it would be an operative deed from Morton H. Ticknor to Enos Ford, instead of to Roselia M. Ford, his wife, and that after being so altered it was delivered to Enos Ford; and upon this finding the judge ruled that it was an operative deed to pass the property, and did pass the property, to Enos Ford, and that he thereupon became the owner of one undivided half part of the premises as tenant in common with his wife.

Enos Ford died on July 21, 1880, leaving a will duly probated, the material part of which is as follows: "After payment of debts and expenses as aforesaid, I give, devise, and bequeath all the rest and residue of the estate, real and personal and of whatever name or kind, of which I shall die seised and possessed, to my wife, Roselia M. Ford, to hold to her during her lifetime, with full power to use and dispose of the same as she shall deem right and proper. And after the decease of the said Roselia M., I give, devise, and bequeath all the remainder of my

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said estate to my son, Wellington M. Ford, to hold to him, his heirs and assigns forever."

Wellington M. Ford was the only child of Enos and Roselia M. Ford, and was the husband of Rosetta W. Ford, the petitioner. He died October 20, 1893, intestate, leaving the petitioner as his widow, and no issue living, and no real estate except that in controversy in this case, the value of which did not exceed five thousand dollars. Roselia M. Ford survived her husband until February 26, 1896, on which day she died, leaving a will duly probated, the material parts of which are as follows: "First. I direct all my just debts and funeral charges to be paid. Second. I give to my daughter in law, Mrs. Rosetta Ford, the sum of two hundred dollars. Third. All the rest of my estate, real and personal, I give to my brother, Heman L. Ticknor, to him and his heirs forever."

On August 16, 1890, Roselia M. Ford executed a deed of the premises to Heman L. Ticknor of Anoka, Minnesota, which deed was acknowledged and placed on record the same day. The judge found as a fact that the deed was executed and placed on record by Roselia M. and the attorney acting for her, to prevent her interest in the property from being taken to satisfy her liability as bail for her son in criminal proceedings, he having forfeited the same; that the deed was never delivered to the grantee named therein, and that he did not know of its existence for more than a year and a half after its execution, and that the deed was executed and placed on record by said Roselia M. and her attorney as a cover, with the fraudulent purpose of concealing her property from seizure and not with the purpose of conveying the title, and that afterwards during the lifetime of Roselia M., and after proceedings brought against her as bail had been compromised, Heman L. Ticknor, for the purpose of removing the cloud upon the title as of record, executed and sent to her a deed of release of the property, and that the same was received by her and kept among her papers, and there found at her decease, but was never recorded. The judge found that said deed of release was delivered to said Roselia M. Ford. He also found as a fact that the two deeds of Roselia M. Ford to Heman L. Ticknor, and Heman L. Ticknor to Roselia M. Ford, constituted a transaction by which

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it was apparently intended to put the property out of Roselia's hands on the record, without actually transferring the ownership, and afterwards to restore the record to conform to the fact of ownership.

The respondent contended, and asked the judge to rule, (1) that by the will of Enos Ford, as matter of law, the widow took an absolute estate in the property of her husband; (2) that if under said will she did not take an estate in fee, she took a life interest, with full power of disposal either by will or deed, and that she executed this power of disposal by her will hereinbefore recited.

During the pendency of the proceedings, the respondent died, and on May 26, 1897, Walter H. Ticknor of Alford, by a paper filed in the cause, suggested his death, and set forth that prior thereto Heman L. Ticknor had conveyed to him the said Walter H. Ticknor the premises described in the petition, and said Walter H. prayed to be admitted a party defendant, and was so admitted and filed an answer. It appeared in evidence, that on April 15, 1896, Heman L. conveyed the premises to Walter H. by deed duly executed, and that the same was recorded on April 27, 1896. The consideration mentioned in the deed was one dollar, and it appeared in evidence, and the judge found as a fact, that, Henry L. Wilcox having sought to purchase the property, and the said Walter H. Ticknor being agent of said Heman L. Ticknor at that time, and the present question as to title having arisen, Heman L. Ticknor deeded the property to Walter H. Ticknor at the suggestion of Wilcox, so that Wilcox might make a contract with him, Wilcox preferring to deal with him. Said Walter H. paid Heman L. one dollar and gave him his promissory note for eighteen hundred dollars, and afterwards gave a bond for a deed to Henry L. Wilcox, by which Wilcox agreed to buy the property at a certain price, and Wilcox went into the occupancy of the premises under the contract, which was still in force.

The respondent asked the judge to rule that Walter H. Ticknor had a right to rely on the title as it appeared upon the record, even if the deed to Heman L. had never been delivered. The judge declined so to rule, and ruled that the deed from Roselia M. Ford to Heman L. Ticknor did not

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operate as an execution of the power in the will of Enos Ford, and ruled and found that the will of Enos Ford did not give to Roselia M. Ford a power to dispose of his estate by will. If the rulings were wrong, the petition was to be dismissed; otherwise, the decree for partition was to be affirmed, or such other judgment entered as law and justice might require.

M. Wilcox, for the respondent.

H. C. Joyner & G. C. Warner, for the petitioner.

BARKER, J. 1. The question raised at the trial in the Superior Court, as to the effect of the deed from Morton H. Ticknor to Enos Ford, is not argued by the respondent. We treat it as waived, and assume that, as found by the Superior Court, from the time of the delivery of that deed to the time of the death of Enos Ford, he and his wife, Roselia M. Ford, were tenants in common of the land now sought to be partitioned, each owning one undivided half.

2. Roselia M. Ford had no power to dispose by will of the one undivided half of the land of which her husband died seised. His family consisted of his wife and a son. The material part of his will is this: "After payment of debts and expenses as aforesaid, I give, devise, and bequeath all the rest and residue of the estate, real and personal and of whatever name or kind, of which I shall die seised and possessed, to my wife Roselia M. Ford, to hold to her during her lifetime, with full power to use and dispose of the same as she shall deem right and proper. And after the decease of the said Roselia M., I give, devise, and bequeath all the remainder of my said estate to my son, Wellington M. Ford, to hold to him, his heirs and assigns forever."

The respondent urges that the devise for life to the wife, "with full power to use and dispose of the same as she shall deem right and proper," gave her, if not a fee, a power of disposal by will, and relies upon the case of *Burbank* v. *Sweeney*, 161 Mass. 490, in support of his contention. But in that case the testator, having no children, gave out of the remainder after the life estate legacies to two of his heirs, and left the rest for his wife to dispose of as she might deem expedient, he himself disposing of it only "in the event that she should make no disposition of it during her lifetime." There the dominant purpose

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of the clause which was held to give the power of disposal by will was to authorize the wife to dispose of the property, and the testator disposed of it only in the event that she did not. Here the dominant purpose is to give the wife a life estate, with a remainder given by the testator to his son, and the power of disposal is merely incidental to the life estate to make it fully effectual, and so that, if she deems best, her use of it during her life may exhaust the full value of the property. We regard the power in the present case as one only to be exercised during the active enjoyment of the life estate, and in aid of that enjoyment. The deed of August 16, 1890, was not an exercise of the power as it was never delivered.

3. Walter H. Ticknor, to whom Heman L. made a conveyance, was a mere agent of the latter, and not a *bona fide* purchaser. He had notice of the true state of the title, and Heman L., and the person to whom he bargained the land knew all the facts. The ruling that Walter H. could rely upon the record title was rightly refused.

Judgment for partition affirmed.

NORTHAMPTON NATIONAL BANK *vs.* CHARLES J. SMITH.

Hampshire. September 21, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Action — Payment of Check by Mistake — Tender.

Where a bank pays money by mistake to the payee of a check which the bank has been instructed by the drawer not to pay, and there is no suggestion that the check was given to the payee as a gratuity or merely for his accommodation, the bank must first tender the check to the payee before bringing an action to recover the money so paid.

CONTRACT, for money had and received by the defendant to the plaintiff's use. The case was submitted to the Superior Court, and, after judgment for the defendant by *Maynard*, J., to this court, on appeal, upon agreed facts, in substance as follows.

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The check in question was given by one Hebert, on March 28, 1896, and was dated the same day. Notice was given by Hebert through an agent to the plaintiff bank on March 30, 1896, before nine A. M., not to pay the check. On March 30, upon the opening of the bank the check was presented for payment by one Orcutt, and payment was refused. Nothing further was heard of the check by the plaintiff until April 27, 1896, when it was presented by the defendant, and was paid by the teller in entire forgetfulness of the fact that payment of the same had ever been stopped. On or about May 1, 1896, Hebert having discovered when his bank-book was balanced that the check had been paid, at once notified the bank that it had been paid against his orders, and refused to have it charged to his account. Immediately thereafter the plaintiff gave notice to the defendant that the check had been paid by mistake, and requested the defendant to refund the amount of the same to the plaintiff, which the defendant refused to do. This order or request was never rescinded; and except for such forgetfulness on the part of the teller the check would not have been paid. There was no concealment or misrepresentation in obtaining the money on the part of the defendant.

The check was never tendered until tendered in court on November 12, 1896. The writ was dated May 26, 1896.

C. N. Clark, for the plaintiff.

A. E. Addis, for the defendant.

ALLEN, J. This action is brought to recover money paid by mistake by the plaintiff to the defendant, upon a check which the plaintiff had been instructed by the drawer not to pay. The statement of facts is imperfect, but it is said in the plaintiff's brief that the check was drawn upon the plaintiff by one Hebert in favor of the defendant, and given by him to the defendant. There is no suggestion that it was so given as a gratuity or merely for the defendant's accommodation, and we assume that it was not so given. Payment had once been demanded and refused, but on a second presentation of the check several weeks later it was paid through inadvertence. The plaintiff demanded a return of the money without tendering the check to the defendant, and there was no such tender until the day of the trial. The only question which has been presented to us is whether it

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was necessary to tender the check before bringing the action; and we think it was.

It has often been held that, when one wishes to rescind a contract and recover what he has paid under it, he must first restore whatever of value he has received. *Snow* v. *Alley*, 144 Mass. 546, 551. *Bartlett* v. *Drake*, 100 Mass. 174, 176. The reasons for this rule are fully applicable to the present case. The check, if unpaid, belonged to the defendant, and would be useful and valuable to him to be used in connection with his own testimony in establishing a claim against Hebert. It has been held that anything absolutely worthless, like a counterfeit bill, need not be returned. *Brewster* v. *Burnett*, 125 Mass. 68. *Kent* v. *Bornstein*, 12 Allen, 342. *Snow* v. *Alley*, 144 Mass. 546, 551. *Reed* v. *Boston Machine Co.* 141 Mass. 454. But the check in the present case was not of that character. If upon its presentation payment had been refused, the plaintiff would have had no right to retain possession of it, and such retention against the defendant's will would have been a conversion. And if, after a payment had been made through inadvertence or mistake, the plaintiff sought to enforce a return of the money, it was its duty first to tender the check to the defendant. It would be of use to him, and he was entitled to have it before returning the money. The case of *Evans* v. *Gale*, 21 N. H. 240, is much in point; and the doctrine of this decision was affirmed in *Cook* v. *Gilman*, 34 N. H. 556. The same doctrine is implied in *Coolidge* v. *Brigham*, 1 Met. 547, 550; *Merchants' National Bank* v. *National Eagle Bank*, 101 Mass. 281, 285; *Estabrook* v. *Swett*, 116 Mass. 303; and *Bassett* v. *Brown*, 105 Mass. 551, 558. See also *Otisfield* v. *Mayberry*, 63 Maine, 197; *Park* v. *McDaniels*, 37 Vt. 594.

Upon the agreed statement of facts, the entry must be,

Judgment for the defendant.

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DAVID TREMBLAY *vs.* MAPES-REEVE CONSTRUCTION COMPANY.

Hampshire. September 21, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence — Law and Fact — Employers' Liability Act — Evidence.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the falling of a stone arch when the plaintiff removed the props of the wooden centre on which it had been built, it appeared that he acted by the direction of the defendant's superintendent; that the arch had been built a little more than two days, and there was testimony that this was not a sufficient time for the mortar to harden; that the brick backing had not been put in, nor had the stone been fastened to the floor of the building; and that there was a door a little to one side, the arch over which had not been built, and according to the testimony of an expert the absence of this lateral support probably permitted the pier on which the arch in question stood to give a little when the prop was knocked out. *Held*, that it could not be said, as matter of law, that there was no evidence that the superintendent was negligent in ordering the centre to be removed. *Held, also*, that an expert could properly be asked whether the arch would have fallen, if the conditions above mentioned, the arch of the door, the brick behind the arch in question, and the dryness of the mortar, had been present, and as to the tendency of their absence.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the falling of a stone arch. The declaration was under the employers' liability act, St. 1887, c. 270. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts material to the points decided appear in the opinion.

W. G. Bassett, for the defendant.

J. B. O'Donnell, for the plaintiff.

HOLMES, J. This is an action for personal injuries caused by the falling of an arch when the plaintiff removed the props of the wooden support or centre on which the arch had been built. The plaintiff acted by the direction of the defendant's superintendent, and the main question raised by the bill of exceptions is whether there was any evidence that the superintendent was

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negligent in ordering the centre to be removed. The arch which fell was of stone, with a curved front. It had been built a little more than two days, and there was testimony that this was not sufficient time for the mortar to harden, especially as it had rained most of the time. The brick backing had not been put in, nor had the stone been anchored or fastened to the floor of the building. There was a door a little to one side, the arch over which had not been built, and according to the testimony of an expert the absence of this lateral support probably permitted the pier on which the arch in question stood to give a little when the prop was knocked out. The superintendent showed that he considered it a question whether the time had come to remove the centre by consulting with one or two other workmen about it. We cannot say that the jury were not at liberty to find that a prudent and competent man would have decided the question the other way. There was testimony which gave a different account of the cause of the trouble, but the jury have disposed of that.

Exception was taken to the allowing of an expert to be asked whether the arch would have fallen, if the conditions above referred to, the arch of the door, the brick behind the arch in question, dryness of the mortar, etc., had been present, and as to the tendency of their absence. We perceive no objection to the evidence. It concerned matters on which technical experience was instructive. *Exceptions overruled.*

WILLIAM F. KINGSLEY *vs.* CHARLES G. DELANO, executor.

Hampshire. September 21, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Statute of Limitations — "Mutual and Open Account Current" — Set-off — Instructions.

At the trial of an action against an executor on an account annexed, the plaintiff, to show that there was a mutual and open account current, testified on direct examination that a mare was to be charged to his account, that "that was the agreement and the understanding" with the testator, that the price was to be twenty dollars, and on cross-examination that it was not to be treated as a cash

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payment, but that "it was to be applied on the account." This was about twelve years before. No credit was given in the account annexed to the declaration, the last item in which was nearly three years before the date of the writ, the defendant did not plead in set-off, and the plaintiff claimed the whole amount. It was agreed that, if the mare was received by the plaintiff as so much money, the plaintiff was not entitled to recover the items prior to the last two, which were the only ones within six years from the date of the writ. The jury returned a verdict for the plaintiff for the full amount. *Held*, that the testimony would justify a finding that there was a mutual and open account current, but that the jury should have been directed to deduct the price of the mare, and to return a verdict for the balance.

CONTRACT, upon an account annexed, against the executor of the will of Henry B. Graves, to recover $146. The defendant set up the defence that all the items except the last two were barred by the statute of limitations. The first item in the account annexed was dated January 17, 1862, and the last was dated January 12, 1894. Writ dated October 27, 1896.

Trial in the Superior Court before *Dewey*, J., who allowed a bill of exceptions in substance as follows.

To show that the items after proof of them had been given were not barred by Pub. Sts. c. 197, the plaintiff relied upon § 8 of that statute, relating to actions upon a mutual and open account current. He testified, in answer to the question whether he had any transaction afterwards with reference to a mare: "I bought a mare of him that had lately foaled. I was to have the mare in the fall when she weaned the colt, and she was brought to my place. I bought the mare for $20. He brought the mare to my place in the fall, and I took her and kept her. The mare was to be charged to my account. That was the agreement and the understanding." On cross-examination he said that it was not to be treated as a cash payment, but that "it was to be applied on the account"; and he also testified that he presented the claim to Graves every year from 1862 up to the time he died, except when he bought the mare, about twelve years before. It further appeared that the plaintiff gave no credit on his books for the mare or the price of the same, and that the defendant failed to find any private accounts of Graves. No credit was given in the account set out in the plaintiff's declaration, and the plaintiff claimed the whole amount. Before the arguments, both counsel agreed that the jury should be instructed that, if the mare was received by the plaintiff as so much money, the plaintiff was not

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entitled to recover the items prior to the last two. The defendant declined to plead in set-off or amend his answer, and contended that the plaintiff could not recover on any of the items except the last two, and that it was not competent for the jury to find upon the evidence that the prior items were part of an open and mutual account current. The judge submitted the case to the jury, directing them that under the pleadings the defendant would not be entitled to have the price of the mare allowed in ascertaining the amount due upon the account, and the defendant excepted.

The jury returned a verdict for the plaintiff for $146, and interest; and the defendant alleged exceptions.

C. G. Delano, for the defendant.

J. B. O'Donnell, for the plaintiff.

MORTON, J. In view of the agreement of counsel and the ruling of the court, the jury must have found that there was an open and mutual account current between the plaintiff and the testator. We think that there was evidence to warrant such a finding. The plaintiff testified, on direct examination, that the mare was to be charged to his account; that "that was the agreement and the understanding"; and that the price was to be $20. On cross-examination he said, amongst other things, that "it was to be applied on the account." This, if believed and taken in connection with the other testimony, would justify a finding that there was a mutual and open account current. *Penniman* v. *Rotch*, 3 Met. 216. *Whipple* v. *Blackington*, 97 Mass. 476. *Safford* v. *Barney*, 121 Mass. 300. *Eldridge* v. *Smith*, 144 Mass. 35.

We think, however, that in one respect there was an error. The defendant declined to plead in set-off, and the jury were thereupon allowed to find a verdict for the whole amount declared on, without making any deduction for the price of the mare.

Whatever the form of the declaration, an action upon an open and mutual account current is in effect for the balance due. *Penniman* v. *Rotch*, 3 Met. 216. *Goldthwait* v. *Day*, 149 Mass. 185. *Dewing* v. *Dewing*, 165 Mass. 230. The statute recognizes this. Pub. Sts. c. 197, § 8. The jury should have been directed, therefore, to deduct the price of the mare and to return a verdict

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for the balance. But if the plaintiff elects to remit the price of the mare, the verdict may stand, and the exceptions will be overruled; otherwise, they will be sustained. *So ordered.*

ALBERT R. WILLARD *vs.* MASONIC EQUITABLE ACCIDENT ASSOCIATION.

Franklin. September 21, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Accident Insurance — "Voluntary Exposure to Unnecessary Danger" — Implied Invitation to cross Railroad Track.

The attempt of the assured in a policy of accident insurance to cross a railroad track between the cars of a freight train at a place where there is no implied invitation by the railroad company to cross, and when the train is in readiness to be moved, of which fact the assured was aware, although he thought that he had time enough to get across in safety, is a "voluntary exposure to unnecessary danger," within the meaning of the policy.

CONTRACT, upon a certificate of membership, wherein the defendant promised to pay the plaintiff the sum of twenty-five dollars per week for a period not exceeding fifty-two consecutive weeks, as indemnity for loss of time resulting from bodily injury caused through external violent and accidental means, within the meaning of the conditions of the certificate. The plaintiff claimed four hundred and fifty dollars for eighteen weeks' loss of time on account of an accident which occurred on September 6, 1895. The policy contained the following conditions: "This insurance does not cover . . . accident . . . resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected; . . . voluntary exposure to unnecessary danger; . . . violating law."

At the trial in the Superior Court, before *Sheldon*, J., the plaintiff, who was superintendent of the gas works in Greenfield, testified that on September 6, 1895, he walked down Miles Street in that town to go to the gas-house, that being the shortest cut, and took a path to the shop of one Field, to reach which by this

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route he would have to cross the tracks of the Fitchburg Railroad; that the path referred to was travelled by everybody who went that way; that a good many people crossed there every day; that he had seen them and had been across there himself hundreds of times; that as he came to the track he saw a freight train standing there; that he stopped and looked up and down the track, and saw what he supposed was the engineer of the train leaning out of his window and looking down on the ground, and two or three rods the other way three or four men whom he supposed were brakemen on the train; that he thought they were waiting for orders to go on, or for another train, and that he had time enough to get across; that he waited possibly a minute, just long enough to look up and down the track to assure himself that everything was safe, and he thought it was safe to cross, and so he stepped up on the step of the front of a car and in between the cars, and just at that time they backed up to take the slack and caught his foot between the draw-bars; that there were six or seven tracks at this place, and he looked along these and there were no trains excepting this one; that the other tracks were all clear with the exception of two or three freight cars that stood scattered along the tracks; and that he was between the third and fourth car from the engine when injured.

On cross-examination the plaintiff testified that the general run of the railroad was east and west; that the railroad station was about ten rods east from the place of the accident on the same side of the railroad tracks, that is, on the north side; that there was a water pipe about half way between the place of the accident and the station; that at the further end of the station, the east end, there was a street under the railroad, and from the end of the station there were stairs leading down from the station platform to the travelled way; that Miles Street was nearly parallel with the railroad tracks at the point where the plaintiff left them, that is, on the north side of the tracks; that if he had continued straight down Miles Street he would have come out at the station; that he left Miles Street at a point twelve or thirteen or possibly fourteen rods west from the station; that he took a path which led in a slanting direction toward the station; that between the place where he was injured and the station was an open space; that the railroad at this point was a double track

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road; that on the north side of the main tracks were one or two side tracks, and on the south side four or five side tracks, and that these tracks were used by the railroad as a yard; that on the south side of the tracks there was a path about three hundred and fifty or four hundred feet west of the point where the plaintiff attempted to cross, leading down to Field's shop; that the train was standing on the east-bound main track; that it would have been considerably further to have gone down Miles Street to the station, and thence by the travelled street to Field's shop; and that the place between the third and fourth car, where the plaintiff attempted to cross, was about a hundred and twenty-five feet from the engine.

The judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

D. Malone, for the plaintiff.

D. T. Montague, for the defendant.

ALLEN, J. There was no implied invitation by the railroad company for the plaintiff or other persons to cross the railroad track at that time and place. The track was actually occupied by a freight train, which was in readiness to be moved. An attempt to cross the track between the cars under such circumstances involves a direct peril, in case the train happens to be moved during the time occupied in getting across. The plaintiff knew that the train was liable to be started soon, he saw the engineer and brakemen in their places upon it in readiness for their work, but he thought they were waiting for orders to go on, or for another train, and that he had time enough to get across. Without any inquiry, he made the attempt simply on his own idea that he would have time enough. This was certainly a risky thing to do, and it was unnecessary, because he might easily have gone round. It was a voluntary exposure to unnecessary danger, within the meaning of the policy. The case is distinguishable from *Keene* v. *New England Accident Association*, 161 Mass. 149, and is more like *Tuttle* v. *Travellers' Ins. Co.* 134 Mass. 175, though even stronger against the plaintiff than that case was. See also *Cornish* v. *Accident Ins. Co.* 23 Q. B. D. 453; *Follis* v. *United States Accident Association*, 94 Iowa, 435.

Exceptions overruled.

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ELISHA S. HALL, assignee, *vs.* JACOB M. HASKELL & others.

Franklin. September 21, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Insolvent Debtor — Finding — Payment — Preference.

If a debtor sells his stock of goods and receives from the purchaser some money, a promissory note, and an order for a certain sum drawn in favor of a creditor and accepted by the purchaser, and the order is at once delivered to the creditor, who credits the amount on the account which the debtor owes to him, a finding that the order was given as and for a payment at the time will be warranted in an action by the assignee in insolvency of the debtor's estate to recover the amount from the creditor, and such payment, being made within six months before the filing of the petition in insolvency, is a "preference" under Pub. Sts. c. 157, § 96.

CONTRACT, or tort, under Pub. Sts. c. 157, § 96, by the assignee of the estate of George M. Underwood, in insolvency, to recover $400, alleged to have been received as an unlawful preference by the defendants from the debtor within six months before the filing of the petition in insolvency. Trial in the Superior Court, without a jury, before *Bishop*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that, on December 3, 1895, Underwood, who was the proprietor of a retail grocery in Orange, was insolvent, and was indebted to the defendants in the sum of $575 upon an open account for merchandise, and the defendants knew that he was insolvent; and that on that day one Brackett, a salesman and collector of the defendants, who had been employed by Underwood to sell out his stock in trade and business in Orange, sold said stock in trade and business to George R. Paige for $3,100.

Brackett had been in the defendants' employ for many years, and was a travelling salesman and collector, and had from time to time visited Underwood at his store, made sales to him and collections from him, and was acquainted with the condition of his business. At Underwood's request, he had been looking for some time to find a customer to buy Underwood out. Finally he found Paige, who was willing to buy, and it was agreed that

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he should purchase the stock of goods at an appraisal to be mutually made by Underwood and Paige with the assistance of Brackett; that out of the proceeds the defendants should be paid $400 on account of Underwood's indebtedness to them, then amounting to $573.13; that Brackett should be paid $200 as a commission for negotiating the sale; and that the sale should be for cash in a few days, except a mortgage upon the stock for $1,000 which Paige assumed, Paige testifying that he only wanted time to "turn round" and go to Bernardston, where he lived, not having all the ready money with him at Orange.

The appraisal was made by the parties as agreed, and amounted to $3,100. On December 3, 1895, a conveyance and delivery of the stock of goods were made by Underwood to Paige, the latter paid Underwood $250 in cash, assumed the mortgage, gave Underwood a note or memorandum for $1,250 payable on five days' time, an order was drawn by Underwood on Paige for $400 payable to the defendants, which Paige accepted, and a like order drawn by Underwood on Paige for $200 payable to Brackett was likewise accepted. Brackett transmitted or gave the order for $400 to the defendants, and they received it and credited the amount upon their account with Underwood in their books on December 5, 1895. Underwood, Paige, and Brackett were together at the store in Orange when the appraisal, transfer of the property, and delivery of the papers as above stated took place.

On January 24, 1896, the debtor's petition was filed; the warrant issued on January 25, and the first publication was on January 28, 1896.

The plaintiff, upon being appointed assignee, brought suit against Paige, claiming to recover the amount agreed to be paid by him for the stock of goods, or their value. This suit was pending until a short time before August, 1896, and then resulted in a judgment against the plaintiff. Paige testified that, on account of the pendency of that suit, he did not pay the defendants the amount of the order for $400 until after the suit was disposed of, but the same was in fact paid in August, 1896.

At the first meeting in insolvency, on February 7, 1896, the defendants offered for proof against Underwood's estate a claim for $173.13, duly sworn to by them, the same being the balance

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of the account of $573.13 due them from Underwood as above stated, with a credit under date of December 5, 1895, "By acceptance of George R. Paige $400," leaving said balance of $173.13.

The defendants contended that, as matter of law, the payment received by them was made by Paige as a surety or guarantor for the insolvent, and not by the insolvent himself, and was made after the first publication of the warrant in insolvency.

At the close of the evidence, the defendants requested the judge to rule as follows:

"1. The plaintiff's right to recover in this action is limited to a payment by the debtor before the first publication of the warrant in insolvency. 2. The plaintiff's right to recover in this action is limited to a payment by the debtor of money before the first publication of the warrant in insolvency. 3. The plaintiff cannot recover a payment made after the first publication of the warrant in insolvency. 4. The plaintiff cannot recover a payment made after the first publication of the warrant in insolvency by an acceptor of the insolvent's draft made and accepted before the first publication. 5. The giving of the draft or order by the insolvent was not a payment, and therefore cannot be recovered. 6. The giving of the draft or order by the insolvent was a payment, and extinguished the defendants' claim to that amount [and the subsequent payment by the acceptor or surety was not a payment on account of the original debt, as alleged, and the plaintiff cannot recover]. 7. It was not a preference for the defendants to receive money in payment of a draft or order from a surety, guarantee, or acceptor of commercial paper of the insolvent who had incurred a legal liability to pay the same, even if the surety, guarantee, indorser, or acceptor had security of the insolvent for his obligation. 8. It is no objection to the conduct of the defendants that they obtained an order or draft of the insolvent on a third party and obtained the third party's acceptance thereof before the first publication of the warrant in insolvency, and the payment thereof by the acceptor after the first publication of the warrant, and the mere fact that the acceptor had security, does not make the defendants' conduct objectionable."

The judge gave the first ruling requested; gave the second

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ruling requested, with the addition, after the word "money," of the words "or the equivalent of money accepted by the creditor as such"; gave the third ruling requested; and, instead of the fourth ruling requested, ruled as follows: "Although the order was paid by Paige after the first publication of the warrant in insolvency, yet the plaintiff can recover if, when the defendants took it, they accepted and received it as cash and in payment of so much of the insolvent's debt, and credited it as such"; declined to give the fifth request; gave so much of the sixth as is not included in brackets, and declined to give the portion in brackets; and also declined to give the seventh and eighth requests, as not called for by or applicable to the facts in the case.

The judge found as a fact, from the evidence, that the order for $400 was given and received as and for a payment at the time of that sum of money by Underwood to the defendants, and was so credited by the defendants; and that it was a payment and discharge made at the time of that amount of his indebtedness to them; and ordered judgment for the plaintiff.

The defendants alleged exceptions.

G. C. Abbott & S. H. Tyng, for the defendants.

E. S. Hall, pro se.

BARKER, J. On December 3, 1895, the debtor, owing the defendants, sold his stock of goods and received in payment from the purchaser some cash, the assumption of a mortgage, a promissory note, and an order for the sum of $400 drawn in favor of the defendants and accepted by the purchaser. The cash, the note, and the order were then the property of the debtor. The order was on the same day taken by the defendants' agent and was delivered by him to them, and was credited by them to the debtor as a payment upon the account which he owed to the defendants.

It was competent for the presiding justice to find, as he did, that the order was given as and for a payment at the time. By this payment the order, which was the debtor's property, was transferred to the defendants in preference, and the rulings refused were upon this state of facts immaterial.

Exceptions overruled.

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ORRILUS W. STUDLEY *vs.* ALBERT F. BALLARD.
HERBERT A. NORTHROP *vs.* SAME.

Hampden. September 28, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Contract to pay Officer for Services outside his Duty, for which the Law allows no Fee — Consideration.

A contract to pay a deputy sheriff for his services outside the line of his duty, for which the law allows him no fee, such as for his time, travel, and outlay in order to get information before filing complaints for search warrants for intoxicating liquor, is good.

TWO ACTIONS OF CONTRACT, by deputy sheriffs, to recover for services and disbursements in connection with certain seizures of liquor. At the trial in the Superior Court, without a jury, before *Wardwell*, J., the defendant requested a ruling that the actions could not be maintained because his promise was without consideration, and because the contract was illegal and void. The judge refused so to rule, and ordered judgment for the plaintiff in the first case in the sum of $15.61, and in the second case in the sum of $13.52; and the defendant alleged exceptions. The facts appear in the opinion.

J. L. Rice, for the defendant.

W. W. Leach, for the plaintiffs.

HOLMES, J. The place of seizure was the town of Hampden. The plaintiffs lived in Palmer. There were other deputies nearer, but the defendant especially desired and requested the plaintiffs to do the work, and promised to pay them. The case is here, after a finding for the plaintiffs by a judge without a jury, upon an exception to a refusal to rule that the contracts were without consideration and illegal. That broad question is the only one before us. It appears that the plaintiffs, at the defendant's request, went to Springfield to get evidence upon which to found complaints, and advice as to the best manner in which to proceed in serving the warrants, and subsequently made complaints, obtained warrants, and served them. We must assume that the judge found that the defendant's promises referred to the pre-

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liminary or outside work and expenditures, and that the trips to Springfield recovered for fall within the promises as thus construed. No question is raised by the exceptions on these points.

It follows that the exceptions must be overruled. The rule of law is simple. A contract to pay an officer for doing his official duty, or to pay him a sum in addition to his statutory fees, cannot be enforced. *Pool* v. *Boston*, 5 Cush. 219. *Brophy* v. *Marble*, 118 Mass. 548. *Hatch* v. *Mann*, 15 Wend. 44. But a contract is good to pay him for services outside the line of his duty for which the law allows him no fee. *Davis* v. *Munson*, 43 Vt. 676. *Trundle* v. *Riley*, 17 B. Mon. (Ky.) 396. *England* v. *Davidson*, 11 Ad. & El. 856. In *Shattuck* v. *Woods*, 1 Pick. 171, 175, it is said that, if an officer returns an execution unsatisfied by consent of the creditor and has incurred any expense, he must look to the creditor for his recompense.

We cannot say that the plaintiffs have been allowed to recover for anything except their time, travel, and outlay in order to get information before filing the complaints. In *Davis* v. *Munson*, *ubi supra*, a deputy sheriff who went in pursuit of escaped prisoners and recaptured them was held entitled to a reward which had been offered. In these cases, as in that, the plaintiffs were under no "specific official obligation" to look up information, and apart from the defendant's promises would have been entitled to no pay for their trouble or expense. It does not appear that what they did fell within Pub. Sts. c. 100, § 43, and it is unnecessary to consider what the effect of that section would be.

Exceptions overruled.

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AGAWAM NATIONAL BANK *vs.* EDWARD B. DOWNING.

Hampden. September 28, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Accommodation Note — Bona Fide Holder for Value — Delay in enforcing Payment — Collateral Security.

Where there is nothing to show that it was known to a bank that the note of A. payable to the order of B. was an accommodation note, or that the bank took the note otherwise than in good faith and for value, in an action on the note by the bank against A., the question whether another note, given after the maturity of the first note, by B., which included the amount of the first note and of another note given by C., which was also overdue and which had been discounted by the bank for B., operated as a payment of the first note, is one of fact, depending upon the intention of the parties and the other circumstances surrounding the transaction; and the finding of the judge, by whom the case was tried without a jury, that it did not operate as payment, is conclusive. Delay by the bank to enforce payment, if not for six years, will not release A.; and the case is not altered because the delay was at the request of the indorser B., and accompanied by an agreement between him and the bank that C.'s overdue note should be regarded as security for the new note given by B.

CONTRACT upon a promissory note, of which the following is a copy:

"$250. Enfield, April 14, 1890. Four months after date I promise to pay to the order of Wm. B. Downing two hundred and fifty dollars at the Agawam National Bank, Springfield. For value received. E. B. Downing."

Indorsed, Wm. B. Downing.

Trial in the Superior Court, without a jury, before *Wardwell*, J., who allowed a bill of exceptions, in substance as follows.

The cashier of the plaintiff bank testified that the note was discounted as an original transaction on April 14, 1890, for William B. Downing, who brought it there; that it had been held in the bank continuously ever since; that not being paid at maturity, William B. Downing was notified; that it had lain in the past-due files until September 27, 1890, when William B. Downing gave his note for $450, which included the amount of the note in question, and another note of $200 given by William H. Downing, which was also in the same condition, overdue, and

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had been discounted for William B. Downing; that the bank retained said overdue note of William H. Downing; that the new note of $450 was renewed from time to time, and occasionally reduced by William B. Downing until October 2, 1895, when it was renewed for four months for the sum of $175, which has never been paid, and was the amount now due the bank; that at the time of the last renewal, on October 2, 1895, the bank delivered up to William B. Downing the aforesaid old note of William H. Downing; that no indorsements of partial payments were made on the original note of Edward B. Downing, now in suit; that that note was held as collateral for the debt of William B. Downing; that he did not consider that he had authority to make an indorsement on this collateral note; and, in answer to a question by the judge, stated that the note in suit was considered as collateral for the $175 due from William B. Downing.

The cashier mailed to the defendant's attorneys a letter, dated March 12, 1896, which stated that "the note of E. B. Downing, $250, was given April 14th, 1890, indorsed by W. B. Downing and discounted by us at that time. It was taken up by W. B. D. with this note and the E. B. D. note left as collateral in connection with other matters, and W. B. D. has reduced his note to $175, which we now hold. W. B. D. told us when we renewed the last time that the E. B. D. note was good, and that his note would probably be paid when due. You will see that the E. B. D. note will soon be outlawed, so we must have something done."

The cashier testified that he meant that the $450 note included some other debt than that which Edward B. Downing's note covered, namely, the debt of $200 on the William H. Downing note, and that they did not carry the $250 note in suit in their account of receivables, but held it only as collateral, and at each renewal between April 14, 1890, and the date of the last renewal, the new note was entered in the account of bills receivable as the property of the bank; that the balance claimed of $175 was all that was left of the amount of the two notes originally discounted for W. B. Downing: one of $250, the E. B. Downing note in suit, and the other of $200, the W. H. Downing note; that by the expression in the letter, "It was taken up by W. B.

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Downing," he meant that it was taken out of the past-due files; that W. B. Downing never had it in his hands; and that he meant that the note was transferred from the regular discount list to the collateral.

It appeared that Edward B. Downing never did any business with the bank, and that the bank never communicated with him about the condition of this note from the time that it was originally taken; and it was agreed that Edward B. and William H. were sons of William B. Downing.

Edward B. Downing testified that at the time when the note was given he was living in his own home and not with his father; that he was not indebted to his father; that his father came to his house, bringing the note, and said that he had got some money to make out; that he could turn his railroad sleepers and lumber into money within a few months; that he wished the son would help him by signing the note; that the defendant looked at the note, knowing that his father was so situated that he could turn the money within the time stated; that his father stated plainly that he would take care of the note at the end of four months; that he never authorized the use of the note as collateral to other notes; and that he did not know until after his father's death, which occurred soon after the last renewal of October 2, 1895, that the bank made any claim to hold him on the note in suit.

In rebuttal, the cashier testified that the bank never had any information that the note in suit was an accommodation note, and that it was discounted as a business note.

The defendant asked the judge to rule that, on all the evidence, the findings must be for the defendant.

The defendant asked the judge to find, on the evidence, that the note in suit was given for the accommodation of W. B. Downing, and that the defendant was not, as between himself and W. B. Downing, indebted thereon; that the only authority which E. B. Downing gave W. B. Downing was that he might get the note discounted; that W. B. Downing had no authority to use this note as collateral security; that the plaintiff bank, since the time the $450 note was given, had only claimed to hold this note as collateral for other notes of William B. Downing given by him on time with discount paid in advance; that for more than four years before William B. Downing died, on November 15, 1895,

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the plaintiff bank had treated this note as William B. Downing's collateral to notes on time and renewed from time to time; that the new note of $450, given after the note in suit was due, was intended as payment of the note in suit, and that thereafter the plaintiff bank and William B. Downing treated the note in suit as collateral only; that the plaintiff bank only held the note in suit subject to the equities between the defendant and his father, W. B. Downing, and that E. B. Downing was not at any time indebted thereon.

The judge did not rule in accordance with the defendant's prayer, but found that no new contract or agreement was made by the bank with W. B. Downing concerning the note in suit, and, at the defendant's request, found that the note was at its inception given for the accommodation of W. B. Downing, but did not make the other findings requested, and found for the plaintiff in the amount of $183.04, being the whole amount claimed by the plaintiff as due upon the note in suit, the same also being the amount of the note of W. B. Downing, dated October 2, 1895, for which the plaintiff held the note in suit as collateral.

The following is a copy of the note of October 2, 1895:

"$175. Springfield, Mass., October 2, 1895. Four months after date, for value received, I promise to pay to the order of Agawam National Bank one hundred seventy-five dollars. Payable at the Agawam National Bank. Wm. B. Downing."

The defendant alleged exceptions.

J. C. Hammond & H. P. Field, for the defendant.

F. H. Gillett & W. W. McClench, for the plaintiff.

MORTON, J. The defendant is the maker of the note in suit. As between him and William B. Downing, the indorser, it was an accommodation note. But there is nothing to show that this was known to the plaintiff, or that it took the note otherwise than in good faith and for value. Whether the $450 note operated as payment of it was a question of fact, depending on the intention of the parties and the other circumstances surrounding the transaction. *Woods* v. *Woods*, 127 Mass. 141. *Brigham* v. *Lally*, 130 Mass. 485. *Dodge* v. *Emerson*, 131 Mass. 467. *Green* v. *Russell*, 132 Mass. 536. *Eames* v. *Cushman*, 135 Mass. 573. *Cotton* v. *Atlas National Bank*, 145 Mass. 43, 45.

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The court must have found that it did not, and its finding is conclusive. *Brigham* v. *Lally*, *ubi supra*.

There was nothing, we think, in the arrangement between the plaintiff and William B. Downing that operated to release the defendant. His liability to the plaintiff was an absolute one. Delay on its part to enforce payment, from whatever motive or however long continued, if not for six years, would not release him. We do not see that the case is altered because the delay was at the request of the indorser, and accompanied by an agreement between the plaintiff and him that the defendant's overdue note should be regarded as security for the new note given by William B. Downing. *Exceptions overruled.*

KENNETH McCAULEY *vs.* SPRINGFIELD STREET RAILWAY COMPANY.

Hampden. September 28, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Assumption of Risk — Law and Fact.

At the trial of an action for personal injuries occasioned to the plaintiff while in the defendant's employ as a conductor on one of its street cars, it appeared in evidence that, while the car passed in the evening under a low bridge, the trolley had to be disconnected from the wire and connected again when it emerged; that the car had a closed end, with a window, out of which it was difficult to lean to make the connection, and the plaintiff had stepped around to the outside, and was standing upon a bumper, when he was thrown off by a jolt; that the plaintiff knew that for several weeks the track had been uneven at this point, having been lifted two or three inches by the frost, although according to his testimony the jolt by which he was thrown off was more severe than usual, and that the weather was moist, and the speed of the car greater perhaps on that account. The judge directed a verdict for the defendant. *Held*, that the ruling was right.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ by being thrown from the bumper of a street car in the evening of May 3, 1896, while he was adjusting the trolley pole to the wire overhead. The declaration con-

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tained four counts, one at common law and three under the employers' liability act, St. 1887, c. 270.

Trial in the Superior Court before *Dewey*, J., who, at the close of the evidence for the plaintiff, directed the jury, at the defendant's request, to return a verdict for the defendant; and the plaintiff alleged exceptions.

J. B. Carroll, (*W. H. McClintock* with him,) for the plaintiff.

W. Hamilton, (*W. H. Brooks* with him,) for the defendant.

HOLMES, J. This is an action of tort for personal injuries, brought by a conductor on the defendant's road. While his car passed under a low bridge the trolley had to be disconnected from the wire and connected again when it emerged. The car had a closed end with a window, out of which it was difficult to lean to make the connection, and the plaintiff had stepped around to the outside and was standing upon a bumper of the car, when he was thrown off by a jolt. For several weeks the track had been uneven at this point in consequence of the frost, having been lifted two or three inches. This the plaintiff knew, although according to his testimony the jolt by which he was thrown off was more severe than usual. The weather was moist, the speed of the car greater perhaps on that account, and as the plaintiff, who was an experienced man, also knew, other things being equal, the extent of the rocking or jolting motion depended on the speed. At the trial, the presiding judge directed a verdict for the defendant, and the case is here on exceptions.

We are of opinion that the ruling was right. The possibility of an occasional jolt is a thing which every one who gets upon a street car must be taken to contemplate. The probability of one in this place the plaintiff specifically knew. Knowing this, he put himself in a position manifestly attended by a serious risk of being thrown off if a jolt should come, when it was open to him to do his duty from a safe place. We assume that he did not expect the motion or shock to be so great as it was, but, under the conditions which we have described, no one could tell exactly what it would be, and, however common the practice may have been, by exposing himself to it he took the chances of its turning out greater or less.

Exceptions overruled.

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FREDERICK W. QUIGLEY *vs.* DOLPHUS BAKER.

Hampden. September 28, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Easement — Evidence — Effect of Non-user of Portion of Way.

In an action for obstructing an alleged right of way, if the deed granting the easement is ambiguous, and after the judge, upon the plaintiff's offer, has excluded evidence of a conversation with the grantor after the purchase and while the grantor owned the adjoining land relating to fencing the plaintiff's land, and admitted evidence as to what was then done, if the plaintiff is asked, on cross-examination, whether the grantor declined to furnish fence posts, and answers in the affirmative, the whole conversation may be admitted upon re-examination, the act of declination shown by such conversation being merely a verbal act.

At the trial of an action for obstructing an alleged right of way granted by an ambiguous deed, the defendant is not entitled to a ruling that the practical location and use of the way by the plaintiff operated as an assignment of the right, and must be deemed to be that which was intended by the deed.

TORT, for obstructing an alleged right of way appurtenant to land in Chester. At the trial in the Superior Court, before *Hopkins*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

C. D. Smith & E. H. Lathrop, for the defendant.

W. S. Robinson, for the plaintiff.

BARKER, J. When the plaintiff received his deed his grantor was the owner of a tract bounded in part upon the south by a highway. With the conveyance of the plaintiff's lot was a grant of "a right of way eighteen feet wide on the east of said lot to highway." The south line of the plaintiff's lot was some considerable distance from the highway. The plaintiff contends, and the jury have found by their verdict, that his right of way extended the whole length of the east line of his lot. The defendant contends that it extended only eighteen feet from the plaintiff's southeast corner, and the defendant has placed a building on land which was subject to the right of way if it extended along the whole east line, and has otherwise obstructed the way if it so extended.

The trial proceeded upon the theory that the deed was ambiguous, and the defendant concedes that extrinsic evidence was

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admissible, and does not argue his first exception to the admission of what was said and done by the plaintiff and his grantor upon the land just prior to the date of the deed, and when the purchase was under consideration, concerning the right of way. The first exception upon which he now relies is to the admission of a conversation between the plaintiff and his grantor, after the conveyance to the plaintiff and while his grantor still owned the remaining land, which conversation related to fencing the plaintiff's land. The presiding justice, upon the plaintiff's offer to show acts and conversation of the grantor after the plaintiff's purchase, and while his grantor owned the adjoining land, admitted evidence as to what was then done, and excluded evidence as to what was then said. This evidence was given by the plaintiff himself. In his cross-examination he was asked whether his grantor declined furnishing fence posts for the east line, and answered in the affirmative. Upon re-examination he was allowed to give the conversation with his grantor relative to the latter's declining to furnish posts upon the east line, and was allowed to give it subject to an exception upon which the defendant insists. His testimony was that he asked his grantor what he would do in regard to any fence on the property so far as the rear lot was concerned, and that his reply was that he would furnish posts for the south line, but declined to furnish any material on the east line because the plaintiff would be liable to remove it at any time. The defendant's question opened the subject without excluding in terms a conversation, and the answer which the defendant accepted to his question might properly be understood to be a statement of a part of a conversation. If it was so understood by the presiding justice, he had a right to admit the whole conversation upon re-examination. But it is evident that the grantor's act of declination was merely a verbal act, and that so far as his words, as testified to by the plaintiff, related to the south line they were immaterial, and could have done the defendant no harm, while the statement of the reason for declining to furnish material for a fence on the east line was an integral part of his declination, and admissible as part of his verbal act. This exception must therefore be overruled.

The remaining exception is to the refusal to rule that the practical location and use of the way by the plaintiff operated

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as an assignment of the right, and must be deemed to be that which was intended by the deed. Such a ruling would have been wrong. If upon the true construction of the deed, having regard both to its language and all extrinsic evidence properly admissible, as well as the evidence of practical location and use by the plaintiff, his right of way extended further than he saw fit at first to locate and use it, he did not lose thereby any part of the way actually granted. *Bannon* v. *Angier*, 2 Allen, 128. *Arnold* v. *Stevens*, 24 Pick. 106. *Exceptions overruled.*

PHILIP J. FLYNN *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Hampden. September 28, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Due Care — Law and Fact — Action — Railroad — Giving of Signals by Whistle — Negligence.

In an action against a railroad corporation for injuries occasioned to the plaintiff's person and property by the alleged negligence of the defendant's servants in blowing the whistle on a locomotive engine improperly, it appeared that the plaintiff, at the time of the accident, was employed with his horse and cart in carrying dirt from an embankment to a highway running parallel to and about seventy feet distant from the defendant's railroad; that he had just dumped a load of dirt when the whistle on the engine of a gravel train which was standing on the railroad was blown, frightening the plaintiff's horse, which started to run, and he, after attempting to hold him, was thrown against a post and injured; and that the horse had worked there for two weeks, and the plaintiff's witnesses testified that the horse had not been afraid of the whistling before this occasion. *Held*, that there was evidence that the plaintiff was in the exercise of due care, and that the horse was safe and gentle.

Although the statements of some of the witnesses at a trial as to the duration of the blowing of whistles on a locomotive engine appear incredible, the jury may think them to be exaggerations rather than intentional misrepresentations, and it is for them to draw such inferences, and to give to the testimony such weight, as they think the appearance of the witnesses and the circumstances disclosed by the evidence fairly justify.

A railroad corporation has the right to establish such signals, in addition to those required by law at crossings, as are reasonable and proper for the operation of its railroad, and if an injury to a person at work with a horse and cart upon an

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adjacent highway happens in consequence of the giving of such signals by the servants of the corporation under circumstances which justified them in so doing, the injured person has no right of recovery against the corporation.

A signal established by a railroad corporation may be reasonable and proper in itself, and yet the circumstances may be such that it would be negligence on the part of the servants of the corporation to use it, and due care might require that the object to be accomplished by the giving of it should be reached in some other manner.

If persons are at work with horses in close proximity to a railroad upon which a gravel train is standing, and they are seen by the employees upon the train, it is a question for the jury, in an action against the corporation for injuries caused by one of the horses becoming frightened by the alleged careless blowing of the whistle on the engine, whether or not it was negligence on the part of the engineer to give at this time by the whistle certain signals which had been established by the corporation.

TORT, for injuries occasioned to the plaintiff's person and property by the alleged negligence of the defendant's servants in blowing the whistle on a locomotive engine "in an unsafe, improper, and careless manner." Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that on May 18, 1895, the plaintiff was employed, with his horse and cart, by the town of Westfield on the "State road," so called, between Westfield and Mittineague; that his work consisted in filling his cart with dirt at an embankment and dumping it on the highway, which was parallel to and about seventy feet distant from the defendant's railroad at this point; that the plaintiff's horse was frightened by whistles blown on a locomotive engine, and started to run, and the plaintiff, in trying to control him, was thrown against a post and received the injuries complained of; and that the horse fell, and died soon after.

The plaintiff introduced evidence tending to show that he had taken out his second load and had dumped it; that a gravel train was standing on the defendant's railroad, and that a whistle was blown four times, giving three sharp blasts and then a long one, two of the witnesses testifying that the whistling lasted about five minutes, and another that it lasted ten or twelve minutes; that the men working on the way, of whom there were seven or eight besides the plaintiff, were seen by the train hands when the whistle was blown; and that the plaintiff's horse had worked there for two weeks, and he had not been afraid of the whistling before this occasion.

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The defendant introduced evidence tending to show that the train in question consisted of an engine and fifty cars loaded with gravel which was dumped at a certain point; that the four whistles were short, sharp blasts lasting only a few seconds, and given, in accordance with a rule established by the corporation, to call in a brakeman who had been left at some distance from the place of unloading with a flag to guard the track from approaching trains; that the order to blow the whistle was given by the conductor to the engineer, and the train started at once; and that the men working on the highway had not been seen before the accident to the plaintiff.

At the close of the evidence, the defendant requested the judge to give the following rulings: "1. Upon the whole evidence, and the pleadings, the plaintiff cannot recover. 2. There is no sufficient evidence that the engineer negligently or heedlessly blew the whistle, and the plaintiff cannot recover. 3. There is no sufficient evidence that the plaintiff was in the exercise of due care, and he cannot recover. 4. It was no part of the duty of the engineer on the train to be on the lookout for the plaintiff or the other men working on the highway. 5. The plaintiff cannot recover other than the value of his horse because of any long continued blowing of the whistle after the horse got away from him."

The judge refused to give these rulings, and, among other things, instructed the jury as follows:

"Now, what were the rights of the parties at the time with reference to one another? They were strangers, as you see, to one another, that is, there was no contractual relation between them. The plaintiff was not in the employ of the defendant, and so owed the defendant no duty as an employee, and the corporation owed the plaintiff no duty as his master. They were precisely in the same condition as if one of you were passing over some highway, driving a horse, for pleasure or upon business in which you might be engaged, and the rights of the plaintiff are to be determined by the same rules of law that would have to be applied in case one of you had an injury in passing over that way through a fright caused his horse by the blowing of a whistle. Now, the defendant corporation had a right to run this gravel train upon its road. It had a right to run it ac-

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cording to such rules as it might adopt, provided those rules were reasonable and proper, having reference to the conditions under which it was occupying its road-bed and with regard to the rights of all other persons upon it in any employment or adjacent to it; so it would be entirely competent for the railroad corporation to establish rules which would govern the action of its servants in the way and manner in which the defendant's witnesses now say their conduct was governed. . . .

"Now, it is obvious that necessarily, in the operation of trains upon railroads, many things will take place calculated to cause fright to horses, and for that matter to people, — disturbance, annoyance to people. Smoke escapes, there is a vibration of passing trains which communicates itself to buildings near by, there is the noise of the bell, and the noise of the whistle, all of which are calculated, perhaps, to cause annoyance and sometimes fright, and the danger, of course, of disturbance and of fright, increases with the proximity of the person to be affected by it, so that where we get a railroad and a highway running parallel and near by, there must be causes of fright and disturbance to persons and animals passing along upon the highway, and for any injury that results from the fright that is caused in that way no recovery can be had against the railroad, because it is only doing that which it is organized and incorporated to do, which public policy authorizes it to do, desires to have done, and therefore an injury which results solely because of fright which is brought about by noises and disturbances caused by passing trains is not in and of itself a cause of action for which recovery can be had against the railroad corporation causing it, but it is only in the event that that which is complained of results from some wrongful, negligent act on the part of the defendant corporation that recovery can be had. . . .

"The plaintiff comes with the burden upon him of proving what he alleges, and the allegation which he makes is that the negligent act consisted of unsafe, improper, and careless whistling. That is the negligent thing that is complained of, so that you see the question of fact is a very simple one. He does not claim that they had not a right to whistle. That is admitted, and he puts his case on the proposition that the act which wrought him the injury was a careless, negligent, and improper

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one. Did the defendant's servant, the engine man, carelessly and negligently blow the whistle upon that occasion? That is a question of fact. Now, I say to you in the outset that if it was a prudent and proper thing to leave the brakeman in the rear to guard that east bound track until the train was removed from it, and if under those circumstances it was a prudent and proper thing to establish a signal to give him notice of the fact, and that the signal which was established, namely, four sharp short whistles, was, in your judgment, a proper signal to give, then the giving of such a signal would not be a negligent blowing of the whistle, and if that was all that was done, and if it frightened the horse, no matter how severe the fright and how distressing it became ultimately to the horse or man or both, then the defendant cannot be said to have performed the negligent act complained of, and this plaintiff would have no right of recovery. It would be an accident. The misfortune would have to lie where it fell upon the unfortunate victim of it; but he puts his case upon the proposition that there was a different blowing of the whistle. He says that he heard three blasts of the locomotive whistle, and they startled his horse, and the duration of them he characterizes as four or five minutes for those three blasts. It is not for me to say that that is absurd. It is for you to consider whether that can be so or not, in the nature of things. Counsel say that, of course, he is mistaken as to the time. That is a suggestion for you to take into consideration; but he says there were three short blasts of the whistle, as distinguishing the blasts from the blast which followed; then he says the fright was completed by the fourth blast of the whistle, which he says was in duration ten or twelve minutes. The same remark that I made with reference to the first statement as to time, you recall here, and in the nature of things, can it be possible that there should be a ten or twelve minutes' blast of the whistle at that time? Well, if you should find that there were three blasts which, in their duration, blasts and intervals, occupied four or five minutes, and that they were followed by a blast which in duration occupied ten or twelve minutes, what would you say about such whistling as that? Was it reasonably necessary to do that in order to warn and call the brakeman who is detached to guard that track? It is not for me to say that that

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would be a careless, negligent use of the whistle. It is not for me to say that the plaintiff commits himself to the proposition that it did take as long as that. I only recall your attention to the evidence in which he states the time in that way. Now, what is the story of the defendant, what is the nature of the evidence upon which it bases its claim? The claim is that the blasts which were given were four in number, and that they were determined by the rules which have been put before you, which establishes that signal for calling in a brakeman. How were they given? It is said by those who have spoken to it that they occupied, blasts and intervals, about four seconds, a short space of time, so that, according to the claim of the defendant, the signal was short, sharp, clear, and decisive, occupying but a brief space of time. Now, if you should find that it occupied a short space of time, and that it took place under such circumstances, then it is, of course, a question for you whether that was a negligent use of the whistle under the circumstances. . . .

"Now, it is said by the plaintiff in his testimony, and it is argued to you by counsel, that the servants of the defendant saw the plaintiff as he was crossing the road, — were looking at him. It is said on the part of the defendant's servants that they did not see or observe him. Now, the mere fact that they saw him, if it be a fact, does not necessarily sustain the proposition that they were negligent in the act of whistling, for reasons I have already given. They would have a right to whistle, although they saw a man passing on the highway, but it is a fact that you are to take into consideration whether or not they did so. Now, if the engineer saw this man upon the highway, and then wilfully, maliciously, knowing that the act would cause fright, blew that whistle, and blew it for the purpose of causing fright, this defendant was not liable for the engineer's act, because it would not be what we know as a negligent act on the part of the defendant's servants, but a wilful act on his part, contrary to the rules of the corporation, and for the wilful act of the servant under those circumstances the master is not responsible. . . .

"The plaintiff must prove affirmatively the fact alleged of negligence. If he fails of that, he fails of a right of recovery. If he sustains that position, then he must also prove that he him-

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self was in the exercise of due care. Counsel have addressed you upon that question, upon both sides. I can add little to what has been said about it. I will say this, however, that his care must extend not only to his own person, but to his own property, so that if he had a horse that was unfamiliar with the disturbing noises that surrounded him there, and which, when brought in contact with them, was likely to become unmanageable, and did become unmanageable, then, inasmuch as the care of the owner extended to his property, there would be imputed to the owner negligence for the use of such an animal under such circumstances and in such a place, or there might be. . . .

"If he was in the exercise of due care, and the defendant was wanting in care, then it is a question of compensation for that injury. He says he lost his horse of a certain value. If, through the negligent act of the defendant, he lost his horse, then he is entitled to the fair market value of the horse at the time. He says he received certain injuries to his person which caused him to lose a certain amount of time, and time is money, and caused him pain and suffering, which he says permanently interfered with the use of one of his legs. You heard the evidence upon the one side and the other, what the chances are for ultimate recovery, how far he has progressed towards recovery, what the nature and extent of the pain have been, and I cannot add anything with reference to the measure of damages to that which so often I have stated to you in cases that have been before you, — reasonable compensation, estimated by your good judgment and knowledge of affairs, and the way in which men are accustomed to suffer by injury to their person."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. H. Brooks & W. Hamilton, for the defendant.

J. B. Carroll & W. H. McClintock, for the plaintiff.

MORTON, J. There was evidence that the plaintiff was in the exercise of due care. He was where he had a right to be, and was doing in the usual manner the work which he had been hired to do. There was also evidence that the horse was safe and gentle. We cannot say that there was not some evidence that the whistle was blown carelessly by being unduly prolonged. Some of the statements made by some of the plain-

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tiff's witnesses are incredible. But the jury may have thought that they were exaggerations rather than intentional misrepresentations, and it was for them to draw such inferences and to give to the testimony such weight as they thought the appearance of the witnesses, and the circumstances disclosed by the evidence fairly justified.

We think that there was no error in the instructions which were given or in the refusal to give the rulings which were requested by the defendant. In addition to those required by law at crossings, the defendant had the right to establish such signals as were reasonable and proper for the operation of its road, and if the injury and loss to the plaintiff happened in consequence of the giving of such signals by the servants of the defendant under circumstances which justified them in so doing, then, as the court instructed the jury, the plaintiff had no right of recovery. *Favor* v. *Boston & Lowell Railroad*, 114 Mass. 350. *Lamb* v. *Old Colony Railroad*, 140 Mass. 79. *Howard* v. *Union Freight Railroad*, 156 Mass. 159. But a signal may be reasonable and proper in itself, and yet the circumstances may be such that it would be negligence on the part of the defendant's servants to use it, and due care might require that the object to be accomplished by the giving of it should be reached in some other manner. It is not for the defendant to establish a signal, however reasonable and proper in itself, and say to its servants that it may be given under any and all circumstances, regardless of consequences. The engineer and conductor were not bound before giving the signal to look and see if there were any persons on the highway, and the defendant was not liable for the damages which a traveller or a teamster on a highway in close proximity to the railroad might sustain in consequence of his horse being frightened by the usual and ordinary noises or appearances which attended the running of trains. But the liability of horses to be frightened by unusual noises is well understood, and there was evidence tending to show that the plaintiff and others were at work with horses and teams only a short distance from the place where the gravel train stood, and that the engineer and others on the train knew of this, and saw the men and teams when the whistle was blown. Under such circumstances, we think that it was rightly left to the jury

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to say whether or not that was negligence on the part of the engineer in giving the signals which were given, even though they were the signals established by the defendant. *Chicago, Burlington, & Quincy Railroad* v. *Yorty*, 158 Ill. 321. We do not understand the defendant to contend that an undue prolongation of the whistling on the part of the engineer would not be negligence, or that it would not be liable to the plaintiff for the damages caused thereby. *Exceptions overruled.*

JOHN F. LOWCOCK *vs.* FRANKLIN PAPER COMPANY.

Hampden. September 29, 1897. — October 20, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Dangerous Machine — Action — Negligence.

If a boy fifteen years old, who for over a month has worked upon a machine having a revolving cylinder and a belt of felting, between which it was his duty to put sheets of paper which had been pasted together, and which, by the motion of the two, were caught and drawn along and dried by the cylinder, which was hot, is injured by having his hand caught in the machine and burnt by the cylinder, he cannot maintain an action against his employer for his injuries, upon the ground of a failure to instruct him of the danger that his hand would be caught if he put it too far in.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ, by having his hand caught in a machine upon which he was working. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts sufficiently appear in the opinion.

W. H. Brooks & W. Hamilton, for the defendant.

A. L. Green & W. C. Heywood, for the plaintiff.

HOLMES, J. This is an action for personal injuries caused by the plaintiff's hand being caught between a revolving cylinder and a belt of felting in a pasting machine which he was attending, and being burned by the cylinder, which was hot. The

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cylinder served the purpose of drying sheets of paper which had been pasted together. The belt of felting pressed the paper against the cylinder, and the motion of the two caught and drew it along. The plaintiff's duty was to put the paper between the two so that it would be caught. According to his testimony, he could put his hand between the cylinder and the felting when the machine was at rest. But he had been engaged upon the work for over a month, he knew that when the machine was in motion it caught and drew in the paper, and he knew that the large cylinder was hot, having burned his knuckles on it before. The negligence relied on is a failure to instruct him of the danger that his hand would be caught like the paper if he put it too far in. Some little reliance is also placed upon the plaintiff's statement that he began to use a split stick to put the paper in and that the foreman told him that it was foolish, that he could use his hands, and it would not be dangerous.

We perceive no sufficient distinction between this case and others which have been decided, and are of opinion that it should have been taken from the jury. Under the circumstances described, whatever his testimony, an intelligent boy of fifteen must be assumed to have known the danger of his hand being drawn in and brought in contact with the hot inward revolving roll. *Crowley* v. *Pacific Mills*, 148 Mass. 228. *Connolly* v. *Eldredge*, 160 Mass. 566. It is suggested that the felt was soft and flexible when at rest, and that the plaintiff may not have appreciated how it would act. But in *Stuart* v. *West End Street Railway*, 163 Mass. 391, the plaintiff was held chargeable with knowledge of the danger of his hand being pulled in by hay which he was holding, — a stronger case than the present.

The alleged statement of the foreman was merely a general characterization of the work as naturally conducted, not an assertion or suggestion that, if one brought his hand in contact with two inward moving surfaces, the usual result would not follow.

Exceptions sustained.

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HERVEY S. DAWLEY *vs.* WAGNER PALACE CAR COMPANY.

Franklin. September 21, 1897. — October 21, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Carrier — Loss of Passenger's Property in Sleeping Car — Action — Negligence — Due Care — Law and Fact.

A palace car company is bound so to manage its cars as not unreasonably to expose the property of a passenger to an unusual risk of loss by theft or otherwise.

In an action against a palace car company for the loss of a passenger's property by theft, if there is evidence that, while a car of the defendant was standing in the station in a large city in the evening, the porter of the car entered with the plaintiff, and, after putting his travelling bag and other property on the seat of the section for which he had a ticket on the side of the car opposite to that on which passengers were received, opened the window opposite the seat without request and in violation of a local rule of the defendant, and then left the car, the question of the defendant's negligence is properly submitted to the jury; and if it appears that the plaintiff immediately left the car, his wife remaining behind near the seat, and then walking the length of the car and back again, sitting down in the section forward of her own, then walking to the platform of the car to speak to the porter, and then sitting down again in the section forward of and facing her own until the train started, when the loss of the property was first discovered, the question whether the plaintiff and his wife were in the exercise of due care, is also rightly submitted to the jury; and it is not the duty of the judge to instruct the jury that the travelling bag was not in the custody of the defendant, but of the plaintiff.

CONTRACT, with a count in tort, to recover for the loss of the plaintiff's property, alleged to have been stolen while the plaintiff was riding as a passenger in one of the defendant's cars, through the negligence of the defendant's servants. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that, on June 25, 1894, he purchased a ticket entitling himself and wife to the use of a section in a sleeping car of the defendant from Chicago to Boston, attached to a train due to leave Chicago at 10.30 o'clock P. M.; that, on reaching the car, the porter took the plaintiff's baggage, preceded the plaintiff, his wife, and a friend into the car, showed them their section, placed their baggage upon the seat, raised the car window in presence of the plaintiff and his wife, and then left the car; that, as they went into the car, the plaintiff's wife remarked,

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"It is very close here, very warm here," and the porter replied, "Yes, and we have n't many lights burning either"; that the plaintiff, after the opening of the window and the going out of the porter, left the car with his friend, and did not re-enter it until the train started, when he found his wife sitting in the section in front of their own section; that, on looking for their travelling bag, he found it was not in their section; that he asked for the conductor, a search was made for the bag, but it could not be found; and that he did not, nor did his wife in his hearing, request the porter to open the window.

On cross-examination, he testified that he had previously travelled in sleeping cars of the defendant, and of the Pullman Palace Car Company; that he thought he had always, on the defendant's cars, had a berth or section check similar to the one afterwards put in evidence by the defendant; that he presumed he might at some time have read the "Notice to Passengers" printed on it; that he had seen notices posted in its cars, which he presumed were duplicates of the one afterwards put in evidence by the defendant, but could not state positively; that the travelling bag lost was about eighteen inches long, quite deep, with flexible sides, well filled but not heavily packed; that the porter carried this bag into the car, also a telescope basket, about twenty-two inches long and eighteen inches wide, packed quite full, an umbrella, and, he thought, his overcoat and his wife's coat, and put them down on the seats in their section; that this was about ten o'clock; that, after leaving the car, he did not again see his wife until the train started at half past ten; that the day was one of the hottest he had ever experienced in Chicago, and the evening was very close; and that he did not know whether the porter opened the window for the comfort of himself and his wife or not, but he had since thought that the porter might have had another motive than that.

The plaintiff's wife testified that she preceded the porter in entering the car; that the porter carried in the travelling bag and overcoat which were lost, and nothing else, and placed them in the forward seat of their section; that the porter then took their telescope basket from the plaintiff and placed it on the rear seat, and took from a friend who had entered the car with them a box of cherries and placed it on the rear seat; that as she was

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passing through the coach she remarked, "How warm and close it is here," a general remark made to no one in particular; that on putting down the articles mentioned the porter opened the window opposite the forward seat of the section; that she did not ask him to do so, and made no remark to him, nor he to her; that she took off her coat and placed it on top of the plaintiff's on the forward seat; that the porter went out as soon as he had opened the window, and the plaintiff and his friend also went out after the porter; that she walked down the length of the car and back, stopped at her section, took off her gloves and placed them in her coat pocket; that she then sat down in the section just forward of her own section, later walked out on to the car platform and spoke to the porter, then again sat down in the section forward of and facing her own, and sat there until the train started; and that the loss was discovered immediately after.

On cross-examination, she testified that she was not watching the things, and did not see or notice the lost articles after she put her gloves in her coat pocket; that the lost articles were placed on the seat and the window opened afterwards; that the things must have been stolen while she was on the car platform, and probably would not have been taken if she had remained in the car; that, in reply to her remark made on entering the car, the porter said, "And we have n't many lights burning either"; that the porter said nothing when he opened the window; that she was not concerned in having the window open; that she was suffering from a sore throat; and that she sat elsewhere as the seats in her husband's section were filled with the bags and other articles placed there by the porter.

The defendant put in evidence, from a letter written by the plaintiff to the defendant's superintendent, dated July 2, 1894, this sentence: "Upon entering the car, we placed our travelling bag, my wife's coat, and my overcoat on the section which we were to occupy"; also a ticket issued by the defendant to purchasers of sections containing the following: "Notice to Passengers. Wearing apparel, baggage, or other valuables placed in the car will be entirely at owner's risk; and employees of this company are forbidden to take charge of the same." Also a notice posted in toilet-rooms on the defendant's cars containing the following: "Notice to Passengers Occupying Sleeping Cars.

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This Company will not be responsible for any valuables belonging to passengers." Also the following among other extracts from its rules for employees: "Porters will be expected to take hand-baggage to the cars and sections to which the passengers may be assigned. . . . The employees of this Company must use every possible precaution while on duty to prevent the loss of any property brought into the cars, and while *en route* cars must not be left unguarded at any time for any period, however short. . . . This Company, or its servants, do not undertake to be the custodians or guardians of the personal effects, wearing apparel, or valuables of passengers, yet it should be the duty of every one concerned to use every effort and afford every protection possible. . . . Under no circumstances will baggage, wearing apparel, or other property of passengers be taken charge of by the employees of this Company and put in lockers, state-rooms, or elsewhere, and only such baggage should be allowed as will go under or in berths. The responsibility and care for same rests wholly with the passengers. . . . In warm weather, while receiving passengers, the doors and windows should be thrown open. The subject of ventilation is one that must be governed very much by the condition of the weather and the temperament and disposition of passengers. Conductors and porters must therefore exercise the most careful judgment in the treatment of this subject."

W. H. Bell, a witness for the defendant, testified that he was porter on the car in which the plaintiff had a section on the night in question, and had been so employed since May, 1893; that the ticket put in evidence was a duplicate of one issued to the plaintiff; that the notice put in evidence was posted in the gentlemen's wash-room and ladies' toilet-room in the car in which the plaintiff had a section, and in all other cars of the defendant; that the rules put in evidence were in force on June 25, 1894; that on that night, about 10 o'clock P. M., he took the plaintiff and his wife to their section; that at that time the door at the end of the car opposite the end at which they entered was locked; that the windows opposite the rear seat in each section had a screen in them, so secured that it could not be opened from the outside; that there were no screens for the forward windows; that he carried in the plaintiff's box and a large tele-

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scope basket, and nothing else, put the box on the floor, and the basket in the seat, and did not see any travelling bag or overcoat; that the plaintiff's wife said, "How terribly hot it is! could n't there be more ventilation? could n't a window be opened?" that he said, "We don't usually raise the windows on that side for fear something will be taken out"; that she then said, "I will be here, I am not going out"; that he raised the window and went out on to the platform to receive passengers; that in ten or twelve minutes the plaintiff's wife came and spoke to him on the platform in regard to having her berth made up; and that the plaintiff walked up and down the station platform, and no one entered the car other than passengers with tickets.

On cross-examination, he testified that a local rule of the defendant required windows in cars opposite to the side on which the porter was receiving passengers to be closed at Chicago, unless opened at the request of passengers; that the plaintiff's section was on the side opposite to the one on which he was receiving passengers; that he should think there was room in the plaintiff's section to sit down; that the plaintiff's wife did not tell him which window to open; that it was against the rule to open either window in her section except at the request of a passenger; that a general order of the defendant directs its servants to do anything that is pleasing to the passengers; that no rules required him to warn a passenger when opening a window at his or her request, but he did so; that he did not remember whether the plaintiff entered the car with him, but, if he did, he left the car before the witness; and that he did not notice particularly what was on the seat when he went out after raising the window.

The defendant introduced the deposition of O. G. Cannon, who testified that he was, on June 25, 1894, a conductor employed by the defendant, in charge of four cars, including that on which the plaintiff had a section, on the train leaving Chicago at 10.30 o'clock P. M.; that he learned of the plaintiff's loss from the plaintiff, and telegraphed to the defendant's superintendent and sent a written statement of the loss to him; that he had no knowledge of any window being open in the plaintiff's section; and that the plaintiff's section was on the side of the car opposite to that on which passengers were received.

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On cross-examination, he testified that the porter was under his control and direction; that it was a rule of the defendant not to open or leave open the window or windows of its cars while standing in the station at Chicago, unless opened at request, and it was his duty to see that this rule was enforced; and that it was not contrary to his instructions to open or allow any windows to be opened in a car of the defendant while standing in the station at Chicago.

At the close of the evidence the defendant requested the judge to rule that the plaintiff was not entitled to recover. The judge declined so to rule; and the defendant excepted.

The defendant requested the judge to instruct the jury as follows:

"1. If, when the porter opened the window in the plaintiff's section, the plaintiff or his wife was present, and sitting or apparently about to sit down in said section, and he had no reason to expect that said section would be left unoccupied by either, it was not negligence on his part to leave said window open, and the defendant is not liable.

"2. It was negligence on the part of the plaintiff, if both he and his wife temporarily and at the same time left their section, knowing that, with the car at rest in a station, an unprotected window, i. e. a window without bars, screen, or watchman, was open in their section, with the plaintiff's property lying on the seat in front of it.

"3. If the articles lost by the plaintiff were, as he contends, stolen, and taken out of the car through the open window, the defendant is not liable, if the plaintiff or his wife put the articles in the place from which they were stolen, and, knowing that the window was open, left the articles there unguarded by either, or by any person, and if the theft would not have been committed had the plaintiff or his wife remained in their section.

"4. If the loss of the plaintiff's property would not have happened except for the fact that both the plaintiff and his wife temporarily left their section, with their property in front of and near an open window, the defendant is not liable.

"5. The articles of the plaintiff placed by him or his wife, or by the porter, in the plaintiff's section, were not in the custody of the defendant, but of the plaintiff."

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The judge declined to give any of the instructions requested, and, among other things, instructed the jury as follows:

"This action is brought upon the theory that some duty which the defendant corporation owed to the plaintiff has been violated, and that the plaintiff has been injured in consequence. It is, therefore, important, and is the foundation of the action, to ascertain what was the duty of the defendant corporation to the plaintiff. The defendant is not a common carrier of passengers or of property; it does not insure the safety of its passengers or of the property which they have with them. Its duty is simply this: to exercise reasonable care that the property which is brought by the passenger into its car shall be reasonably secure from injury or theft. In other words, it is not responsible unless it is shown that it was negligent in the care of the property thus brought by the passenger having a ticket into its cars, and the degree of care which must be exercised by it depends upon the circumstances, the place, the knowledge which the officers or servants or agents of the road have with reference to the situation both within the car and without, and upon the general knowledge which the corporation has. It is such care as ought ordinarily to be exercised by ordinarily prudent persons or corporations engaged in similar work under similar circumstances. Now the plaintiff says that here, dealing with it in that light, the duty which the law imposed upon the defendant was not fulfilled; that it was a negligent act upon the part of the servant of the defendant corporation to open the window when the car was standing before its departure, and to leave the property of the plaintiff unguarded. There are two classes of evidence, or rather, two views of the evidence applying to one fact, that as you determine one way or the other may determine this action, and that is with reference to opening of that window. If that window was opened by the servant of the defendant corporation at the request, express or implied, of the plaintiff or of his wife with his knowledge, then the plaintiff cannot recover. . . .

"Now suppose you do not find that, but find that the defendant's servant opened the window without any request, express or implied, then it is admitted that a rule of the defendant corporation was violated by its servant. That is not decisive at all, but it is for you to say whether that act, with the knowledge

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upon the part of the servant of the defendant corporation as to the condition in which things were left makes it a negligent act upon the part of the corporation, because, within the general line of his duty, the act of the servant done as in this instance the corporation is responsible for. Now, if you assume, or if you find, that the window was opened without any request, express or implied, upon the part of the plaintiff or his wife with his knowledge, but was opened by the porter, against the rule of the company, then what happened, — and that is material, — what knowledge had the porter at the time he opened that window and left it as to the proximity to that window of any of the property of the plaintiff, and that it was to remain there. It is important for you to ascertain and determine whether all those articles had been placed in that seat or those seats before the porter left. If they had, then he had knowledge that the property of the plaintiff was within the seat against which that window was open. Now, if with that knowledge, then another fact comes in which it is important for you to find as bearing upon this question, and that is, what knowledge had Bell that the plaintiff or his wife was to remain there and care for the property? If you are satisfied that any such declaration was made by the plaintiff's wife as Bell testifies to, that she was going to remain there, then to that extent the defendant was relieved of the obligation of care. Because with the knowledge of the situation by the plaintiff and his wife, that the window was open, that their property was there, and the assumption by them that they would remain and care for it, it cannot be said under those circumstances that the departure of Bell, the servant of the defendant corporation, having opened a window, was a negligent act on the part of the defendant corporation, and I instruct you as a matter of law with reference to that.

"Now, the plaintiff cannot recover if his own want of proper care contributed to his loss. Two things must conspire in order that the plaintiff shall recover, one which I have already dealt with, the failure to perform its duty by the defendant, placed upon it by the law; and secondly, what I am about to come to, careful conduct upon the part of the plaintiff. Now, whatever you find with reference to the fact, whether that window was opened at the request of the plaintiff or not, this is true, as I

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understand it, that it was opened with the knowledge of the plaintiff, and that either the plaintiff himself, or Bell, the servant of the defendant, with the knowledge of the plaintiff, placed the plaintiff's property in the seat against which that window was opened. Now, take that situation, with knowledge upon the part of the plaintiff that his property is there and that the window is open, what is the situation? Was it a negligent act for him to go out and leave the property? There is no evidence, as I understand, that he went out and left no one within the car. There is no dispute that his wife was within the car or at its end during all the time from the first entrance until after the property was missed. Now, was it a negligent act upon her part, with the knowledge of the situation, to take a seat out of her own section or not? What would people of ordinary intelligence and understanding under similar circumstances do? If she took a seat in the next section where she could view that window and where she could see the coats hanging over the back of the seats, if she had been looking would she have seen that property taken or not? Now, although it was true, it is a question perhaps for you to say exactly in whose custody that property was; it may have been partly in the custody of each. Possibly it was in the custody of the defendant company simply in this view, that it was within the car over which the company had control. But did the plaintiff surrender control of his property to the defendant company, or did the defendant company assume the exclusive control of that property and care of it? Those are matters, of course, for your consideration under the conditions you find existing, and if upon either branch of the case the plaintiff fails to satisfy you by a fair preponderance of the evidence, then your verdict must be for the defendant."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. L. Greene, (*W. A. Davenport* with him,) for the defendant.

E. S. Hall, for the plaintiff.

KNOWLTON, J. The general propositions of law applicable to this case are not in dispute. The questions raised depend for their determination upon the view to be taken of the facts in their relation to the principles of law established in like cases. It is agreed that the plaintiff's travelling bag was not in the cus-

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tody of the defendant in such a sense as to create the ordinary liability of common carriers of merchandise, and the jury were so instructed. *Lewis* v. *New York Sleeping Car Co.* 143 Mass. 267, 273. On the other hand, upon the view of the relations of the parties most favorable to the defendant, the defendant was under some obligation to the plaintiff in reference to his property. It was bound so to manage its car as not unreasonably to expose the plaintiff's property to an unusual risk of loss by thieves or otherwise. The evidence of negligence on the part of the defendant was slight, but we think it entitled the plaintiff to go to the jury. The defendant's servant, after putting the plaintiff's travelling bag and other articles in a seat on the side of the car opposite to that on which passengers were received, opened the window opposite the seat. The jury might have found that he did this without request from anybody, in violation of a rule of the company which forbids the opening or leaving open of a window or windows of its cars opposite to the side on which the porter is receiving passengers while standing in the station at Chicago, unless opened at request. It was done at about ten o'clock in the evening. The jury might have found, from the existence of this rule, that there were peculiar risks at that place, from lack of light or from other causes, and that the violation of the rule by the defendant's servant was an act of negligence that exposed the plaintiff's property to a peculiar risk, which the plaintiff did not know or appreciate.

The jury might have found that the plaintiff was in the exercise of due care. It was a question of fact whether the plaintiff was negligent in leaving the car while his wife remained near the seat, and it was also a question of fact whether she was negligent in walking down the length of the car and back again, and in sitting down in the section forward of her own, and in walking to the platform of the car to speak to the porter and then sitting down again in the section forward of her own, and facing toward her own, and sitting there until the train started. The jury might well believe that she was in a position to exercise reasonable care and vigilance in reference to possible thefts by persons in the car, and that she and the plaintiff had reason to believe, from the act of the porter in opening the window opposite the seat, that there was little or no danger of the taking

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of the travelling bag by a person outside, on account of the presence of the servants of the defendant, or of other trainmen or officers about the station.

For the reasons stated above, the judge rightly refused to instruct the jury that it was not negligence for the porter to open the window if the plaintiff or his wife were sitting or about to sit in the section, and if he had no reason to expect that the section would be left unoccupied by either of them. He opened the window about half an hour before the time for the train to start, and if the plaintiff or his wife were sitting or about to sit there, his having no reason to expect that they would leave the section unoccupied would not be equivalent to an assurance, or even an affirmative belief, that they would remain in that section constantly for half an hour.

The next three requests for instructions were rightly refused, for the reasons stated above, in connection with the question whether the plaintiff and his wife were in the exercise of due care.

It was not the duty of the judge to instruct the jury that the travelling bag was not in the custody of the defendant, but of the plaintiff. The jury were instructed that there was no such custody by the defendant as to create the ordinary liability of a common carrier. The relations of the respective parties to the property at this time were all in evidence, and were matters of fact to be determined by the jury. Whether the travelling bag was strictly in the custody of the plaintiff or not was of no consequence except as a part of the evidence. The judge was not called upon to instruct the jury as to the effect of the evidence in this particular. If it was in the custody of the plaintiff rather than that of the defendant, the defendant was still in such relation to it as to owe certain duties to the plaintiff in reference to the management of its car. The questions arising on the testimony were questions of fact, which were submitted to the jury under proper instructions.

Exceptions overruled.

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SWIFT RIVER COMPANY *vs.* FITCHBURG RAILROAD COMPANY.

Hampshire. September 21, 1897. — October 21, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Negligence of Railroad in delivering Merchandise — Contract — Trover — Damages — Law and Fact.

In an action against a railroad company for failure to deliver at E. in this Commonwealth, with reasonable despatch, two steel boilers and fittings and castings, which were shipped to the plaintiff from F., the defendant admitting that the delay in delivery was caused by its negligence in first sending the merchandise to E. in another State, if there is no evidence which fairly tends to show that the defendant had notice of the circumstances attending the ordering of the boilers, or of the nature of the plaintiff's business, and the use to which the boilers were to be put, or of the fact that the plaintiff's mill was stopped or to be stopped for the purpose of making a change in boilers, and such notice cannot be inferred fairly from the character of the property, or from the fact that the old boilers were sent over the defendant's road to the same person who had furnished the new ones soon after those had been shipped, the plaintiff is not entitled to damages, as they could not have been within the contemplation of the parties when the goods were received for transportation, and were not the proximate result of the delay on the defendant's part, except in the single particular of cash expended for "telegrams, time, and expenses looking for boilers, and team for hauling expected boilers."

TORT, in two counts, to recover damages for the defendant's failure to deliver at Enfield in this Commonwealth with reasonable despatch two steel boilers and fittings and castings, which were shipped to the plaintiff from Fitchburg over the defendant's railroad. Trial in the Superior Court, without a jury, before *Wardwell*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that the goods were shipped on August 3 and should have been at Enfield on August 5; that they were sent by mistake on the defendant's part to Enfield, New Hampshire, and in consequence were not received by the plaintiff until August 13. The defendant admitted that the delay was caused by its negligence, and the only question was one of damages.

The plaintiff offered to prove that the boilers and attachments were not such as are kept in stock, and that they have no market value, but were especially ordered by the plaintiff to replace old

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boilers in the plaintiff's factory; that it had ordered the boilers to be shipped from Fitchburg on August 3, and, anticipating the arrival at Enfield on the 5th of the same month, made preparations to receive and place the boilers, which preparations involved the stopping of the entire plant of the plaintiff. It offered to show that, in daily expectation that the boilers would arrive, it expended $355.25 in cash items, all of which was for labor and for a temporary roof and removing the same, except "telegrams, time, and expenses looking for boilers, and team for hauling expected boilers, $15"; and that the use of the boilers during the time it was wrongfully kept out of the use of the same by the defendant would have been worth $350, and the cash loss and delay an additional sum of $350.

There was no offer to show that the defendant had notice of the circumstances attending the ordering of the boilers, or the arrangements to replace the old boilers with them, except as appeared in the plaintiff's offer of evidence, and so far as the nature of the property and the circumstances set out in the offer of proof would naturally suggest the same.

The judge excluded all the evidence offered by the plaintiff on the question of damages, and ruled that, assuming all the facts offered to be true and proved, yet the plaintiff, as matter of law, would be entitled to nominal damages only, and found for the plaintiff in the sum of one dollar; and the plaintiff alleged exceptions.

W. G. Bassett, for the plaintiff.

G. A. Torrey, for the defendant.

MORTON, J. There are two counts in the declaration, one for negligently failing to carry with reasonable despatch, and the other in trover, and both being for the same cause of action. The goods were shipped on August 3, and should have been at Enfield on August 5. They were sent by mistake on the defendant's part to Enfield, New Hampshire, and in consequence were not received by the plaintiff till August 13. The defendant admits that the delay was caused by its negligence, and the only question is one of damages.

We doubt whether under the circumstances trover will lie. *Robinson* v. *Austin*, 2 Gray, 564. But under whichever count the damages are assessed, the measure must be the same. The

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defendant is liable for such damages as are the natural and proximate results of its conduct, and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was entered into as the probable result of a breach of it. *Harvey* v. *Connecticut & Passumpsic Rivers Railroad*, 124 Mass. 421. *Derry* v. *Flitner*, 118 Mass. 131, 134. *Cutting* v. *Grand Trunk Railway*, 13 Allen, 381. *Goddard* v. *Barnard*, 16 Gray, 205. *Hadley* v. *Baxendale*, 9 Exch. 341. There was no evidence, we think, which fairly tended to show that the defendant had notice of the circumstances attending the ordering of the boilers, or of the nature of the plaintiff's business and the use to which the boilers were to be put, or of the fact that the plaintiff's mill was stopped or to be stopped for the purpose of making a change in boilers. Such notice could not be inferred fairly, we think, from the character of the property, or from the fact that the old boilers were sent over the defendant's road to the same person who had furnished the new ones soon after those had been shipped. The damages which the plaintiff claims, with a single exception to be noticed hereafter, could not have been therefore within the contemplation of the parties when the goods were received for transportation. Neither do we think that they were the proximate result of the delay on the defendant's part. *Waite* v. *Gilbert*, 10 Cush. 177. *Ingledew* v. *Northern Railroad*, 7 Gray, 86. *Brock* v. *Gale*, 14 Fla. 523. *Johnson* v. *Mathews*, 5 Kans. 118. *Cooper* v. *Young*, 22 Ga. 269. *Gee* v. *Lancashire & Yorkshire Railway*, 6 H. & N. 211.

The plaintiff's mill might have been stopped from any one of numerous causes. If the market value of the property had depreciated in consequence of the delay, or the property had suffered damage through exposure to the weather, such loss would have been the proximate result of the delay, and the defendant would have been liable for it. But assuming that the boilers were of a special kind, and were not bought and sold in the market, we think, as already observed, that except in one respect the damages which the plaintiff claims were not the direct or proximate result of the delay. Amongst the cash items expended by the plaintiff is one for "telegrams, time, and expenses looking for boilers, and team for hauling expected boilers, $15." We think that

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this should have been allowed. *Waite* v. *Gilbert*, *ubi supra*. Very likely this was not called especially to the attention of the court. But, as the ruling was that the plaintiff was entitled to only nominal damages, the exceptions must be sustained, and it is so ordered. *Exceptions sustained.*

COMMONWEALTH *vs.* CARRIE M. SESSIONS.

Worcester. October 4, 1897. — October 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Obtaining Money by False Pretences — Indictment — Criminal Pleading — Evidence — Variance — Exceptions.

An indictment alleged that the defendant, at a time and place named, with intent to cheat and defraud A., falsely pretended and represented to him that the defendant "had theretofore secured and had positive evidence that moneys" of B. to a certain amount were deposited in some bank or banking institution or trust company in P., and the defendant "had theretofore made some certain arrangement whereby, upon the payment of" a certain sum to the defendant by A., "the president of said bank or banking institution, or of said trust company, would hold said moneys" of B. subject to attachment on a petition for separate maintenance of A.'s daughter, which was then pending; that A., "believing the said false pretences and representations . . . and being deceived thereby," was induced by reason thereof to deliver, and did, at the time and place named, deliver to the defendant certain bank notes of a specified aggregate value, which the defendant then and there received by means of the false pretences and representations, and with intent to cheat and defraud A., "whereas, in truth and in fact," as the defendant then and there well knew, he "had not theretofore secured and had not positive evidence that moneys of" B. to the amount named "were at the time aforesaid deposited and held in any bank or banking institution, or in any trust company in" P., and he "had not theretofore made any certain arrangement whereby, upon the payment of" the sum named to him by A., "the president of said bank or banking institution, or of said trust company, in" P., would hold said moneys of B. subject to attachment on said petition of A.'s daughter. *Held*, that the negation in the indictment of the truth of the pretences and representations was sufficient; and that the form of the indictment was not open to objection.

The averment, in an indictment for obtaining money of A. by false pretences and representations, that he believed such pretences and representations, if necessary at all, is sufficient, without averring that he believed them "to be true."

At the trial of an indictment for obtaining money of A. by false pretences, alleging that A., at a time and place named, was induced by such pretences to and did pay a certain sum to the defendant, if the evidence for the government tends to show, and there is no evidence to the contrary, that A. procured the

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money alleged to have been paid to the defendant from B. on the day alleged, evidence that, at an earlier date, and before he procured the money in question, A. had been paying large sums of money to other persons, is rightly excluded.

Upon an indictment for obtaining money by false pretences, it is not necessary to prove that the full amount of money alleged in the indictment was so obtained.

It is no variance to prove, at the trial of an indictment for obtaining money by false pretences in W., that the money was actually received by the defendant in B.

If, at the trial of an indictment for obtaining money by false pretences and representations, there is no evidence tending to show that the representations alleged were true, the defendant has no ground of exception to the refusal to give an instruction based upon the supposition that they were true.

At the trial of an indictment for obtaining money of A. by falsely pretending that the defendant had positive evidence that money of B. to a certain amount was deposited in a certain bank, and that the defendant had made an arrangement whereby, upon the payment of a certain sum by A. to the defendant, the president of the bank would hold such money of B. subject to attachment upon a certain petition of A.'s daughter then pending, there was evidence of false pretences made the day before the money was paid by A. to the defendant; and that the defendant refused on the next day to tell A., before he paid him the money, the name of the president of the bank. *Held*, that the request for a ruling, "that there were no representations or false pretences when the money was paid, and that the variance is fatal," was rightly refused.

INDICTMENT, alleging that the defendant, on July 16, 1896, at Worcester, with intent to cheat and defraud George L. Stevens, did then and there falsely pretend and represent to him that she "had theretofore secured and had positive evidence that moneys of one George H. Hill to the amount of forty-seven thousand dollars were deposited and held at the time aforesaid in some certain bank or banking institution or trust company in Providence, in the State of Rhode Island," and that she "had theretofore made some certain arrangement whereby, upon the payment of five thousand dollars to her" by Stevens, "the president of said bank or banking institution, or of said trust company, would hold said moneys of said George H. Hill subject to attachment thereof on a certain petition for separate maintenance of one Ella L. Hill," the daughter of Stevens, which petition was then pending in the Probate Court for the County of Worcester against George H. Hill; that Stevens, "believing the said false pretences and representations, . . . and being deceived thereby," was induced by reason thereof to deliver, and did on said sixteenth day of July at Worcester deliver, to the defendant "sundry United States Treasury Notes of the aggregate value of five thousand dollars, sundry National Bank notes of the aggregate value of five thou-

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sand dollars, sundry silver certificates of the United States of the aggregate value of five thousand dollars, sundry gold certificates of the United States of the aggregate value of five thousand dollars, of the moneys and effects of" Stevens; and that the defendant then and there received and obtained the same by means of the false pretences and representations, and with intent to cheat and defraud Stevens of the same. "Whereas, in truth and in fact," as she then and there well knew, she "had not theretofore secured and had not positive evidence that moneys of said George H. Hill to the amount of forty-seven thousand dollars were at the time aforesaid deposited and held in any bank or banking institution, or in any trust company in Providence in the State of Rhode Island," and she "had not theretofore made any certain arrangement whereby, upon the payment of five thousand dollars to her" by Stevens, "the president of said bank or banking institution, or of said trust company, in said Providence would hold said moneys of" George H. Hill subject to attachment thereof on the petition of Ella L. Hill.

In the Superior Court, before the jury were impannelled, the defendant moved to quash the indictment, for the following reasons:

"1. There is no allegation in the indictment that there was not forty-seven thousand (47,000) dollars in a Providence bank or trust company, as alleged. 2. The indictment does not allege that the defendant had not such evidence as it is alleged she represented was in her possession. 3. The indictment does not allege that the said evidence was not delivered to Stevens. 4. The indictment does not allege that the defendant did not deliver the evidence or has ever refused to do so. 5. The indictment does not allege that Stevens did not receive such evidence and that the arrangements were not made. 6. The indictment does not allege that Stevens ever requested the defendant to deliver to him said evidence. 7. The indictment does not allege that any or all the pretences or representations were not true. 8. The indictment does not allege that Stevens believed the pretences or representations to be true. 9. The indictment does not allege that by reason of the representations he was induced to part with any property. 10. The indictment does not allege that Stevens ever accepted or received the evidence and was thereby

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induced to part with property. 11. The indictment does not allege that Stevens, believing the pretences and representations to be true, parted with any property. 12. The indictment does not allege that the defendant asked, requested, or demanded any moneys or effects from Stevens. 13. The representations are too remote from the payment of the money. 14. The indictment does not allege a past or present offence, but at most a promise or an opinion or a statement as to something which may happen. 15. The indictment does not allege the pretences or representations to be of an existing or material fact. 16. The indictment does not set forth a crime by proper affirmative allegation, but consists merely of inferences and argument. 17. The indictment does not contain all the material facts and circumstances which the Commonwealth would be bound to prove in order to produce a conviction. 18. The pretences alleged are not squarely negatived, as required by the rules of criminal pleading. 19. The defendant has not been fully and fairly informed of the nature of the charge against her, so as to afford ample opportunity for every meritorious defence. 20. One of the allegations consists of a representation whereby, on the payment of five thousand dollars to the defendant, she would deliver certain evidence, while another allegation is that Stevens delivered to the defendant twenty thousand dollars. 21. The indictment does not allege a crime punishable by the laws of this Commonwealth."

Gaskill, J., overruled this motion; and the defendant excepted.

At the trial, there was evidence that Stevens was in poor circumstances, and had no large sums of money and no real estate, and had had no income since July 1, 1896, except his wages as a common mechanic; and that, on July 16, 1896, he received a sum supposed to be $5,000 from one Durrell, of Boston, and gave the same immediately to the defendant. The defendant denied ever having received this money, or any portion of the same; and offered to show that Stevens had been, since July 1, 1896, employing persons to look up evidence in another case, and had been paying large sums of money to them. This evidence the judge excluded; and the defendant excepted.

The defendant testified in her own behalf, and denied that she had ever secured any evidence that money belonging to George

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H. Hill was deposited in any bank or trust company in Providence, Rhode Island, or that she had ever made any arrangement whereby the president of "said bank or trust company" should hold any money of George H. Hill subject to the order of the Probate Court in Worcester upon the petition of Ella L. Hill for separate maintenance against George H. Hill; and there was no evidence tending to show that the representations alleged in the indictment were true. Hill testified that he never had any money, securities, or property in the State of Rhode Island, or under the control of the president of any bank, banking institution, or trust company in that State.

Stevens testified that the defendant made the representations to him, as alleged in the indictment, in Worcester; that he, relying upon them and believing them to be true, went to Boston the next day after the representations were made, that is, on July 14, 1896, procured a check from Durrell for $5,000, returned to Worcester and met the defendant, who declined to accept the check, but demanded the money in cash, and repeated in substance the representations made on the previous day, as alleged in the indictment; that he thereupon arranged with the defendant to meet her in Boston on the next day, July 16, and pay her the money; that he procured the money of Durrell, who sent the check to a bank and got it cashed, met the defendant in Boston as arranged, and paid her the money, and when the money was so paid no one was present except himself and the defendant; that before he handed her the money he asked her to inform him as to the name of the president of the bank, and she replied that she would not tell; and that he thereupon, without further request, handed her the money, and never after that asked her in reference to the false pretences or representations alleged.

Upon this evidence the defendant asked the judge to rule "that there were no representations or false pretences when the money was paid, and that the variance is fatal."

The judge refused so to rule; and the defendant excepted.

At the close of the evidence, the defendant requested the following rulings:

"1. If the jury find that the amount paid or given to the defendant does not agree with the amount alleged in the indictment, they must return a verdict of 'Not guilty.' 2. If the jury

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find that the place where the money was given to the defendant is described in the evidence as at Boston, they must return a verdict for the defendant. 3. The allegation that said money was paid at Worcester is not supported by the evidence, and therefore the jury should return a verdict for the defendant. 4. There is a variance in the allegations in the indictment, in regard to the representations as to the amount to be given the defendant and the amount received, and therefore there must be a verdict for the defendant. 5. If the jury find that the defendant did not receive $20,000, there must be a verdict for the defendant. 6. If the jury find that the money was not given at Worcester, there must be a verdict for the defendant. 7. If the jury find that Stevens did not give the defendant $20,000 at Worcester, July 16, 1896, they must return a verdict for the defendant. 8. If the jury find that the representations of positive evidence, as alleged in the indictment, were true, they must return a verdict for the defendant.

The judge refused to give these rulings; and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. W. Sheehan, (*L. Cutting* with him,) for the defendant.

A. P. Rugg, Assistant District Attorney, for the Commonwealth.

ALLEN, J. This is an indictment for obtaining money by false pretences. It set forth in substance that the defendant, on the 16th of July, 1896, at Worcester, with intent to cheat and defraud George L. Stevens, did falsely pretend and represent to him that she "had theretofore secured and had positive evidence that moneys of one George H. Hill to the amount of $47,000 were deposited and held at the time aforesaid in some certain bank or banking institution or trust company in Providence," and that she "had theretofore made some certain arrangement whereby, upon the payment of $5,000 to her" by said Stevens, "the president of said bank or banking institution, or of said trust company, would hold said moneys of said George H. Hill subject to attachment thereof on a certain petition for separate maintenance of Ella L. Hill," daughter of said Stevens, which said petition was then pending. And said Stevens, "believing the said false pretences

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and representations, . . . and being deceived thereby," was induced by reason thereof to deliver, and did on said 16th of July, 1896, at Worcester, deliver to the defendant sundry United States Treasury Notes of the aggregate value of $5,000, sundry National Bank notes of the aggregate value of $5,000, sundry silver certificates of the United States of the aggregate value of $5,000, and sundry gold certificates of the United States of the aggregate value of $5,000, and she then and there received and obtained the same by means of the false pretences and representations, and with intent to cheat and defraud said Stevens. Whereas, as she then and there well knew, she " had not theretofore secured and had not positive evidence that moneys of said George H. Hill to the amount of $47,000 were at the time aforesaid deposited and held in any bank or banking institution, or in any trust company, in Providence," and she " had not theretofore made any certain arrangement whereby, upon the payment of $5,000 to her " by said Stevens, " the president of said bank or banking institution, or of said trust company, in said Providence would hold said moneys " of Hill subject to attachment on said petition of said Ella L. Hill.

The defendant presented many objections to the form of this indictment. One of them is, that the negation of the truth of the pretences and representations should have been broader, and that the indictment should have contained an averment that in point of fact no such sum of money of Hill was on deposit. No decision is cited to us which holds that such averment is necessary. The representation was that she had secured and had positive evidence of such deposit, and that she had made an arrangement whereby, upon payment of $5,000 to her, the president of the bank or trust company would hold the moneys subject to attachment. The inducement held out to Stevens was, in effect, that upon payment of the money by him to her she would make it possible for him, acting in his daughter's interest, to make an attachment of a large fund belonging to Hill. If Hill had secretly placed a large sum on deposit, and the fact was unknown to her, the existence of such deposit would be wholly immaterial. She was to put Mrs. Hill in the way of making an attachment, and she represented, according to the averment, that she had positive evidence of the deposit, and had already made an arrangement whereby

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it could be attached. The negation in the indictment was sufficient. It was explicitly to the effect that she had no such evidence, and had made no such arrangement, as she then and there well knew.

Nor was there any need of an averment that she did not deliver such evidence to Stevens, or that she refused to do so, or that Stevens did not receive such evidence, or that he ever requested the defendant to deliver such evidence to him; nor of a more distinct averment that she asked for the payment of the $5,000 by Stevens to her.

The averment that Stevens believed the false pretences and representations, if necessary at all, was sufficient, without saying that he believed them "to be true." This form of averment has been very common. *Commonwealth* v. *Nason*, 9 Gray, 125. *Commonwealth* v. *Hooper*, 104 Mass. 549. *Commonwealth* v. *Coe*, 115 Mass. 481. *Commonwealth* v. *Parmenter*, 121 Mass. 354. *Commonwealth* v. *Stevenson*, 127 Mass. 446 (1st count). *Commonwealth* v. *Howe*, 132 Mass. 250. *Commonwealth* v. *Lee*, 149 Mass. 179. *Commonwealth* v. *Drew*, 153 Mass. 588. *Commonwealth* v. *Blanchette*, 157 Mass. 486. It was not intended, in *Commonwealth* v. *Dunleay*, 153 Mass. 330, to intimate that, as a matter of technical pleading, it was necessary to add the words "to be true."

All of the other objections taken to the form of the indictment must also be overruled.

The evidence as to other payments of money by Stevens to various persons was immaterial. The evidence for the Commonwealth tended to show that he procured the $5,000 alleged to have been paid to the defendant from one Durrell in Boston on July 16. The evidence on this subject was specific and precise, and there was nothing which tended to show that he procured it otherwise. Under this state of things, evidence that since July 1, and before he procured the money in question, he had been paying large sums of money to other persons had no relevancy.

Upon an indictment for obtaining money by false pretences, it is not necessary to prove that the full amount of money alleged in the indictment was so obtained. If an indictment charges the obtaining of $20,000, a conviction can be had upon proof of obtaining $5,000. *Commonwealth* v. *Lee*, 149 Mass. 179, 185.

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The rule is the same in an indictment for larceny. *Commonwealth* v. *O'Connell*, 12 Allen, 451.

It was no variance to prove that the money was actually received by the defendant in Boston, instead of in Worcester, as charged. By Pub. Sts. c. 213, § 21, it is expressly provided that this offence may be alleged to have been committed, and may be prosecuted and punished, in any county in which the false pretence was made.

The judge rightly refused to instruct the jury that if they should find that the representations of positive evidence, as alleged in the indictment, were true, they must return a verdict for the defendant. It appears that the defendant testified in her own behalf, and denied that she had ever secured any evidence that money belonging to Hill was deposited in any bank or trust company in Providence. There was no evidence tending to show that the representations were true. Under these circumstances, it was not open to the defendant to contend that the representations were true. See *Clark* v. *Lowell*, 1 Allen, 180.

The request for a ruling "that there were no representations or false pretences when the money was paid, and that the variance is fatal," was also rightly refused. There was evidence of false pretences made in Worcester the day before the money was paid, and these, if they induced the payment of the money, would support the averments of the indictment. The defendant's refusal at Boston to tell Stevens the name of the president before she got the money did not show conclusively that the money was not paid in consequence of her false representations. According to the averment of the indictment, she represented that she had made an arrangement whereby, upon the payment of the money to her, the president would hold the moneys of Hill, so that they could be attached. The payment to her was to precede the action of the president, and her refusal to make any disclosure before getting it was quite consistent with her guilt.

The objections and exceptions of the defendant are all overruled.

Exceptions overruled.

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ALFRED LAMOUREUX, administrator, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

SAME *vs.* SAME.

SAME *vs.* SAME.

Worcester. October 5, 1897. — October 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Loss of Life — Railroad — Grade Crossing — Action — Negligence — Evidence — Damages.

In an action against a railroad corporation for causing the death of the plaintiff's intestate at a grade crossing, by failure to give the signals required by statute, a witness testified that "what took my attention was the train came along and there was n't any whistle or sound from the train, and I says to myself, 'That 's funny'"; that "it did n't whistle or ring, and I sat there right along until I heard a noise," which noise was explained as one that happened after the accident; and that he heard no electric gong or other sound of warning during the same time. *Held*, that the evidence was sufficient to show absence of signals.

If the signals required by statute were not sounded, the jury, in an action against a railroad corporation for causing the death of a traveller in the evening at a grade crossing, may infer that the absence of them occasioned the accident, where he was seen driving at a trot a mile and a half from the crossing, and then was awake, and the train was an extra one.

If the plaintiff in an action, in cross-examination of a witness for the defendant, puts in evidence a conviction of crime to discredit him, the defendant cannot, upon re-examination of the witness, introduce evidence to explain the conviction.

At the trial together of three actions against a railroad corporation for causing the death of the plaintiff's intestates, one of whom died instantly, one in two weeks, and one, a child, in two and a half months after the accident, the judge, in the course of his charge, stated that possibly there was evidence of conscious suffering of one of the intestates, but, at the defendant's request, instructed the jury, at the close of the charge, that the plaintiff could not recover damages for conscious suffering. The verdict in the second case was $1200 larger, and that in the third case $600 larger, than the one in the first case. *Held*, that there was no error in the instructions; and that this court could not draw inferences that the jury were misled from the differing size of the verdicts.

THREE ACTIONS OF TORT, under Pub. Sts. c. 112, § 213, by the administrator of the estates of Alfred Lamoureux, Rosilda Lamoureux, and Edmond Lamoureux, respectively, for causing their deaths. At the trial of the cases together in the Superior Court, before *Gaskill*, J., it appeared that, on August 30, 1896, at about eleven o'clock in the evening, the first named intestate,

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with the other two, who were his wife and child, were struck, while in a wagon drawn by one horse, by a train at the crossing of a highway at grade by the defendant's railroad in Northbridge; that, as the result of the collision, Alfred Lamoureux died instantly, Rosilda died on September 13, 1896, and Edmond died on November 13, 1896; and that the crossing where the accident occurred was one to which the provisions of Pub. Sts. c. 112, § 163, applied.

The jury returned a verdict for the plaintiff in each case, the verdicts being for $1,466.50, $2,641.51, and $2,080 respectively; and the defendant alleged exceptions, which appear in the opinion.

F. P. Goulding, (*W. C. Mellish* with him,) for the defendant.

H. Parker, for the plaintiff.

HOLMES, J. These are actions of tort, brought under Pub. Sts. c. 112, § 213, for causing the death of the plaintiff's intestates by failing to give the signals required by § 163. The plaintiff has had verdicts, and the cases are here on exceptions. We take up the questions as they were argued for the defendant.

1. It is urged in the first place that there is no evidence that the engineer of the train which killed the deceased did not ring its bell or sound its whistle. But we think it too plain to need discussion that the evidence was sufficient. A witness testified that "what took my attention was the team came along and there was n't any whistle or sound from the train, and I says to myself, 'That 's funny.'" Even without the last words, which were admissible as a sign of attention, this means that the silence of the bell and whistle attracted the witness's notice, and not merely that she did not observe them. The witness further testified, "It did n't whistle or ring, and I sat there right along until I heard a noise," and the noise was explained as one which happened after the accident. We see no ground for doubting that the witness's testimony to her attention was meant to include the whole time covered by her statement of fact. Other parts of her testimony, tending to show inattention, cannot obliterate what she said on this point. The same witness testified that she heard no electric gong or other sound of warning during the same time.

2. If the signals were not sounded, the jury might infer that the absence of them caused the accident. The deceased Alfred

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Lamoureux was seen driving at a trot a mile and a half from the station, and then was awake, as he turned to one side to let the witness pass. The train was an extra train, which there was no reason to expect beyond the general possibility. It was open to the jury to infer that the deceased was awake when he drove upon the track at the crossing, and that if there had been a signal he would have acted as men commonly do when they know that a train is approaching. *Doyle* v. *Boston & Albany Railroad*, 145 Mass. 386, 388. *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57, 59.

3. The plaintiff, in cross-examination of one of the defendant's witnesses, put in a conviction of crime to discredit him. Pub. Sts. c. 169, § 19. Upon redirect examination the witness was asked to state the circumstances, the evidence being offered to show the extent of the wickedness involved in the act, and to show the circumstances. This evidence was excluded. Logically, there is no doubt that evidence tending to diminish the wickedness of the act, like evidence of good character, which is admissible, does meet, as far as it goes, the evidence afforded by the conviction, since that discredits only by tending to show either general bad character, or bad character of a kind more or less likely to be associated with untruthfulness. *Gertz* v. *Fitchburg Railroad*, 137 Mass. 77, 78. Nevertheless, the conviction must be left unexplained. Obviously the guilt of the witness cannot be retried. *Commonwealth* v. *Gallagher*, 126 Mass. 54. *Gertz* v. *Fitchburg Railroad*, 137 Mass. 77, 80. It is no less impossible to go behind the sentence to determine the degree of guilt. Apart from any technical objection, it is impracticable to introduce what may be a long investigation of a wholly collateral matter into a case to which it is foreign, and it is not to be expected or allowed that the party producing the record should also put in testimony to meet the explanation ready in the mouth of the convicted person. Yet if one side goes into the matter, the other must be allowed to also. We have considered the question as if the offer had been in the most guarded form. As it was made, it was almost identical with the one excluded in *Commonwealth* v. *Galligan*, 155 Mass. 54, 56.

4. There was no error in the instruction about damages. In the course of the charge the presiding judge stated that possibly

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there was evidence of conscious suffering of one of the parties, and the statement, if left unexplained, perhaps might have led the jury to think that such suffering could be allowed for in an action under the statute. But, at the defendant's request, the judge cleared this up by instructing the jury in terms that the plaintiff could not recover damages for conscious suffering, and that was the last word spoken about that part of the case. We cannot draw inferences that the jury were misled from the differing size of the verdicts. *Exceptions overruled.*

ANNIE E. RUMRILL, administratrix, *vs.* JOHN H. ASH.

Hampden. October 5, 1897. — October 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Evidence — Admissions — Instructions — Exceptions.

If the judge presiding at a trial refuses to instruct the jury, as requested by the defendant, that evidence of verbal admissions should be received by them with great caution, and to give other instructions of similar import, and in his charge states correctly the nature of evidence of admissions and the elements which give such evidence weight, the defendant shows no ground of exception.

If a witness at the trial of an action testifies to an important admission made to him by the defendant, and a fact as to the subsequent conduct of the witness brought out in his cross-examination, if left unexplained, would warrant the argument that no such admission was made, and the defendant's counsel states to the judge that he should contend that it was significant, the witness is rightly permitted to explain such fact.

No exception lies to the admission of testimony of a witness for the plaintiff in an action, which is part of a conversation that was important and was admitted without objection, and which contains nothing more than the defendant had previously admitted in his testimony.

CONTRACT, by the administratrix of the estate of James B. Rumrill, upon a promissory note for $3,400 or $3,500, alleged to have been made by the defendant on November 30, 1894, payable on demand to the plaintiff's intestate, and to have been lost. Answer: 1. A general denial. 2. Payment. Trial in the Superior Court, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that the plaintiff's intestate was without property

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until about October 1, 1894, when he came into possession, by inheritance, of about $9,000, mostly in cash; that he had lived apart from his family for the ten years next preceding his death; that he boarded at a hotel in Chicopee kept by the defendant from about October 1, 1894, until January 6, 1895, when, owing to some trouble between him and the defendant, he removed to a neighboring hotel, and there died on January 19, 1895, after a short illness; and that the plaintiff is his widow.

To prove the consideration for the note, the plaintiff called Arthur B. West and Edward Pynchon, cashier and teller respectively of the Chicopee National Bank of Springfield, each of whom testified that the plaintiff's intestate had an account at that bank from October 12, 1894, until his death, and identified two checks drawn by him to the order of the defendant, one for $500, dated November 9, 1894, and one for $3,000, dated November 30, 1894, both indorsed by the defendant; and that the defendant deposited both checks, each on the day of its date, to his own credit, in the same bank, where he also had an account.

The witness West testified, against the defendant's objection, that the plaintiff's intestate made a deposit of $7,000 on October 12, 1894, in said bank.

William G. Rumrill, a son of the plaintiff's intestate, testified that, on the morning of his father's death, he called on the defendant and asked him "if he knew where my father's deeds and notes and bank-book were, and he said he did n't know where his notes were; but his deeds were locked up in his (defendant's) safe"; and that he also said, "There is that note of mine for thirty-five hundred dollars, and one of John Sullivan's for fifty dollars, I don't know where they are." Upon cross-examination, the witness testified that the defendant told him at the same interview that the last he knew of the notes and bank-book they were in the safe of one Frank Morton, a few minutes' walk from the place where the interview took place; and that the witness did not go to Morton's to look for them. Upon redirect examination, the witness was asked, "Why did n't you go to Frank Morton's safe?" The defendant objected, and, in answer to a question by the judge, stated that he should contend that there was significance in the failure to go to Morton's. The witness was then permitted to answer, against the defend-

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ant's objection, "The day my father took the papers away from Mr. Morton's safe he told me he had been over there and got them from Mr. Morton, and he said he and Mr. Morton had a few words. That 's why I did n't go there, and I told the defendant they were n't there because my father told me so." It did not appear at what time this conversation between the witness and his father occurred, and the defendant did not ask to have the evidence restricted to any particular purpose.

The defendant testified that he paid back to the plaintiff's intestate $100 at the time he received from him the check for $3,000, and gave his note for $3,400; that he paid the note to the intestate in bank bills in three instalments, the last being at the defendant's barn on January 11, 1895; that his brother, Thomas J. Ash, was present at the last payment; that the note was delivered up to him when the last payment was made; and that he immediately afterwards showed it to his wife, Annie C. Ash, and destroyed it in her presence. The defendant's brother and wife corroborated respectively his testimony in regard to this last payment and the destruction of the note. Thomas J. Ash also testified that the plaintiff's intestate told him about one of the other payments, and one Kelley corroborated Thomas J. Ash in respect thereto. The defendant also testified that some deeds belonging to the plaintiff's intestate were delivered to him by the latter prior to the making of the note in suit, and were kept in his safe until after the intestate died; but that he never had the conversation with the witness Rumrill which the latter testified as occurring on the morning of the intestate's death.

In rebuttal, one Fitzgerald, an employee of the defendant during all the time the intestate was boarding at the defendant's hotel and for several months thereafter, and who knew before the intestate's death that he had lent a considerable sum to the defendant, testified that on several occasions shortly after the intestate's death the defendant made statements to the witness to the effect that the sum was $3,500; that he had not repaid it; and that he had got the note for $3,500 which he gave for it and had destroyed it, and cautioned Fitzgerald to keep still about it. The defendant denied that he ever made such statements; and there was other testimony tending to prove that, since this action was commenced, Fitzgerald had stated, "The note has been paid.

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I did n't see the money paid, but I remember the time when it was paid." Fitzgerald denied making such statement.

Sidney Sanders, the attorney who brought the action, also testified, in rebuttal, that, at an interview with the defendant shortly after the intestate's death, he demanded payment of the $3,500, whereupon the defendant stated that the note was for only $3,400, and that he had paid it to the intestate; that, in answer to questions by the witness, the defendant stated that he paid it a few days after the intestate left his hotel; that he paid it "on the bridge," which was not the place where the defendant testified that he paid either of the instalments; that he paid it in bills; that no one was present; and that the note was then and there delivered up to him and destroyed by him. The witness was then asked, "Before the defendant left your office that day did you say you would sue him?" and, against the defendant's objection, was permitted to answer, "I have forgotten, so I could not say absolutely, but I presume I told him, when he said he was n't going to pay it, that I should sue him if it was not paid." The defendant had previously testified, without objection, upon cross-examination, in relation to this interview, that Sanders told him at the close of the interview that he should sue him.

At the close of the evidence, the defendant requested the judge to instruct the jury as follows:

"1. Evidence of verbal admissions should be received by the jury with great caution. 2. Admissions and declarations should be scrutinized and received by the jury with caution, as that is the most dangerous evidence that can be admitted in a court of justice, and the most liable to abuse. 3. Evidence of admissions by the defendant should precisely identify the admissions, and show such admissions deliberately made by the defendant."

The judge refused to give the instructions requested, and upon the point covered by these requests instructed the jury as follows:

"There is evidence with reference to conversations between William G. Rumrill, who is the son of James, and the defendant, which would tend to show, provided you are satisfied of the truth of the evidence, that the defendant did not at that time assert that he had paid the note, but on the contrary made statements which would lead to the inference that he had not paid the note.

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But you understand that the defendant denies that he had such conversation. Then there is evidence in the case to which your attention has been directed in argument, and which you ought to consider together with all the other evidence in the case, coming mainly from Fitzgerald. Fitzgerald says that soon after Rumrill died, if not on the same day then the next day, he had a conversation with the defendant, in which he said to him in effect, — I do not undertake to state it precisely, — but in effect that he was indebted to Rumrill in a considerable sum; he did not name the sum; that he, however, had the note which he had given to Rumrill and that nobody would know anything about it, and that he, Fitzgerald, should not say anything about it to anybody. And the plaintiff relies to some extent upon this statement then made, and upon a subsequent occasion by the defendant to Fitzgerald. Fitzgerald relates another conversation at a later time, which he had with the defendant, in the course of which he made substantially the same statement, that he owed Rumrill this money, but that he had acquired possession of the promissory note, and that the Rumrills could not prove that he owed the father and husband, and that he, Fitzgerald, should say nothing about it. As I say, the plaintiff relies upon that evidence, as well as the other evidence in the case. Now, if you are satisfied upon the evidence in the case that Fitzgerald has related to you the substance of what the defendant said to him upon those occasions to which reference has been made, and you are first to be satisfied that he has given you the substance of those statements, why then that will be evidence that will be entitled to consideration; it will be evidence in the nature of an admission of indebtedness upon the part of the defendant to James B. Rumrill, and, furthermore, evidence of an assertion upon his part that he owed Rumrill. It sometimes happens, as you know, as we all know, that where one man undertakes to repeat something which some other person has said to him, he, through not using the correct equivalent of the words which were employed in the conversation, gives a different complexion and color to what has been said than it ought really to have, and therefore it is important that you should be satisfied, as I have already said, that Fitzgerald has repeated correctly in substance what the defendant said to him. If you are satisfied that he has given the sub-

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stance correctly of what the defendant said, then, as it has been suggested, that would be in the nature of an admission upon the part of the defendant, in the nature even of an assertion, that he owed Rumrill this money and that he was undertaking to escape from the payment of the debt to the estate by suppressing the evidence of the debt, that is, the promissory note. I do not mean, by referring to these particular pieces of evidence, to give to them undue prominence over the other testimony in the case. It is for you to say what significance the evidence shall have. It is for you to say how much more important one piece of evidence is than another, if there is a difference in the effect and significance of one as against another."

The jury found specially that the note was for $3,500, and that it was destroyed without right by the defendant, and returned a verdict for the plaintiff; and the defendant alleged exceptions.

D. E. Leary, for the defendant.

J. L. Rice & J. T. Moriarty, for the plaintiff.

KNOWLTON, J. 1. No exception lies to the refusal of the presiding justice to instruct the jury that evidence of verbal admissions should be received with great caution, and to give the other instructions requested of similar import. The weight of such evidence is for the jury, and although it is not error for a judge to give general instructions in regard to the nature of a certain class of evidence, and the considerations which properly arise in dealing with it, he must be careful, if he does this, not to invade the province of the jury by intimating an opinion upon the facts of the particular case, nor to state propositions which are not true in their general application to evidence of that class. If he chooses to leave the jury to deal with questions of fact in the light of their experience and judgment, without his aid, the parties have no legal ground of objection. *Commonwealth* v. *Downing*, 4 Gray, 29. *Commonwealth* v. *Whitcomb*, 12 Gray, 126. *Commonwealth* v. *Wood*, 11 Gray, 85. *Commonwealth* v. *Brown*, 121 Mass. 69. *Commonwealth* v. *Bishop*, 165 Mass. 148. In the present case the judge stated correctly the nature of evidence of admissions, and the elements which give such evidence weight. These instructions were sufficient for the assistance of the jury.

2. The witness Rumrill, the son of the plaintiff's intestate,

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testified to an important admission made by the defendant on the morning after the death of the witness's father. The fact brought out in his cross-examination, that he did not go to look for the note in the safe of Morton, after the defendant had told him that it was there the last he knew of it, could have been used by the defendant's counsel in argument with considerable effect as tending to show that no such admission was made, if the testimony had been left unexplained. The defendant's counsel, in reply to a question by the judge, stated that he should contend that it was significant. The explanation by the witness was therefore rightly received. The conversation was not competent to show the truth of the matters stated in it, but it gave an adequate explanation of the conduct of the witness.

3. The testimony of Sanders that was objected to was rightly admitted. It was a part of a conversation which was important, and which was admitted without objection. Moreover, it contained nothing more than the defendant himself had previously admitted in his testimony.

The exception to the testimony of West has not been argued, and we treat it as waived. The testimony was rendered immaterial by the subsequent admission of the defendant.

Exceptions overruled.

JOHN C. MALONEY *vs.* UNITED STATES RUBBER COMPANY.

Worcester. October 5, 1897. — October 21, 1897.

Present: FIELD, C. J., HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Assumption of Risk — Negligence.

If an employee, whose duty it is to assist another employee in baling felting upon a steam belting press, selects, from a lot provided by his employer, several blocks or joists, and hands them to his fellow employee, who places them in position, and then, in sight and with the knowledge of the first named employee, applies the power, and thereafter, while under pressure so applied, one of the blocks, which was old and bent, flies from its place and injures the first named employee, he must be held to have assumed the risk, and an action for his injuries cannot be maintained.

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TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration was at common law. At the trial in the Superior Court before *Gaskill*, J., there was evidence tending to show that at the time of the accident the plaintiff was about thirty-five years of age; that he had worked in a mill of the defendant known as the Lawrence Felting Company for about two weeks before the accident, in which mill was manufactured and packed felting for lining of rubber boots and rubber overshoes; that before that time he had worked in another mill of the defendant for about seven years in making rubber boots, and that about seven years before the accident he had worked for about two years in the Lawrence Felting Company Mill; that he had worked previously on a steam baling press for six months off and on; that he used to put on the blocks with whatever man he was working with, just as he did when he was hurt, and then had the pressure put on to press the bales down; that on the day of the accident the other man was arranging the blocks, and he was picking them up for him, and handing them to him; that he stood near while the other man was arranging the blocks, and he saw the other man apply the power; that there was a room known as the finishing room, in which among other machinery was a power baling press used for pressing together and baling the layers of felting preparatory to being shipped away from the mill; that the press consisted of a stationary base 36 by 42 inches; that at or near the corners of this base were four upright rods, up and down which ran an upper platform or follower of the same dimensions as the base, which was attached to a knuckle-joint press, and to this knuckle-joint press was applied the power; that the total height of the machine was about eight feet, and the distance between the base and follower when it was down, about three feet, and when it was up as high as possible, about six feet; that at the time of the accident the plaintiff, together with another workman, who had charge of the press, was at work piling the goods upon the press; that there was first placed upon the stationary base a wooden platform somewhat larger than the stationary base; that upon this wooden platform was piled the felting which was to be baled to the height of about four feet; that upon the top of the felting so piled was placed another wooden platform similar to the one on which the goods

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were piled; that on this wooden platform were placed, first, four pieces of 2 by 6 joists running the narrow way of the machine and laid flatwise, two of these pieces being about three feet long, and the other two about fifteen inches; that above these and at right angles to them, and parallel to the joists first put in position, were placed two other pieces of 2 by 6 joist laid flatwise and about two feet apart; that above these and at right angles to the last described joists, and at right angles also to those first laid, were placed two joists about three feet long and 2 by 6 set upon the narrow or two-inch edge and standing upright six inches and placed about fifteen inches apart; that on the top of these two last mentioned, and at right angles to them, were placed four other pieces of joist laid flatwise, and that to this structure so built up was applied the follower, when the power was attached to the knuckle-joint press above by the man who piled up the pieces of joists; that he was told by the man working on the press to hand up to him pieces of joist from a pile lying upon the floor, which he did, not taking all there were; that the plaintiff handed to the other man all the pieces used by him for the blocking, and the man piled them as above described, and that after the plaintiff had completed his work he took a needle and stood in front of the press waiting for the bale to be finished, so that he could assist in sewing the burlap and completing the bale; that the power was applied, and after the follower had descended upon the cob-house structure of joists about one foot, a piece of the joist standing upright upon the rear of the press split lengthwise about midway, and the upper part of it, being 2 by 3 inches long, was thrown through a window, and the piece of joist placed parallel with the one which broke struck the plaintiff in the face and threw him to the floor, causing the injuries; that the method of piling the joists upon the top of the bale used at the time of the accident was the way in common use at this mill on this machine; that the piece of joist which split had been in use a long time, and was worn and bent, although not cracked, before the accident, so far as could be seen; and that the machine had been in use less than a year.

The plaintiff, upon cross-examination, when inquired of if he was not a man of ordinary intelligence, said, "I did not know as I was; I do not know about that; I might have been." The

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plaintiff admitted that his name was signed to an instrument, of which the following is a copy: "Received from Lawrence Felting Company Thirty-seven Dollars and Fifty cents ($37.50) in full settlement of all demands to date from the United States Rubber Company, a corporation chartered under the laws of New Jersey, for injury received at their factory known as the Lawrence Felting Co., Millville, Mass."

The plaintiff testified that after he came out of the hospital the defendant's superintendent told him to go into the office and get his pay, and that they should not pay him any more; that prior to this time, since the accident, his pay envelope had been made out as usual and given to his wife regularly, and that pay for four weeks at the rate of $7.50 per week had been paid in this way before the paper was signed; that when the paper was signed $7.50 was paid him, making $37.50 received by him in all since the accident; that he supposed that he was signing the receipt for his pay, as this was the last pay he was to get from the company unless he went to work for it again; that he signed the paper without knowing what it was; and that he could read and write only in a very poor manner.

At the conclusion of the evidence for the plaintiff, the judge, at the defendant's request, directed a verdict for the defendant; and the plaintiff alleged exceptions.

J. R. Thayer & A. P. Rugg, for the plaintiff.

H. Parker & C. C. Milton, for the defendant.

HOLMES, J. There can be no pretence that the plaintiff had not taken the risk of the general mode of using the baling machine. His ground of recovery, if any, must be that which was most relied on by his counsel, namely, that an unsuitable joist was furnished to him, which was unsafe when subjected to the high pressure which it had to undergo. But the plaintiff took his choice from a pile lying before him. If there were any defects in the one which he selected, he could see them as well as anybody, and might have taken another. The only defects visible to any one were that the joist was old and bent. *Allen* v. *Smith Iron Co.* 160 Mass. 557.

It is unnecessary to consider whether the evidence with regard to the manner in which the parol receipt was signed would not have warranted going behind the conclusion which it seemed to

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establish, that the thirty-seven and a half dollars mentioned in it was received in satisfaction of the plaintiff's supposed claim. See *Curley* v. *Harris*, 11 Allen, 112, 121, 122; *O'Donnell* v. *Clinton*, 145 Mass. 461, 463. *Exceptions overruled.*

FRANK D. PERRY *vs.* WOLF POTASHINSKI.

Worcester. October 6, 1897. — October 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Mechanic's Lien — Labor furnished under Subcontract — "Consent" of Owner — Finding — Construction of Contract.

If A. employs B. to build a house on A.'s land under a contract which provides that B. shall "not let, assign, or transfer this contract, or any interest therein, without the written consent of the architect," and B. makes a written subcontract with C., by which the latter is to excavate for the cellar, do the grading about the building, and build the foundation walls, referring to the principal contract, upon a petition by C. against A. to enforce a mechanic's lien for his labor, under Pub. Sts. c. 191, although there is no evidence that A. knew that C. made the subcontract or did any work, and no written consent of the architect, a finding that C.'s labor was performed by "consent" of A., within the meaning of § 1, is right.

The provision in a contract for building a house, that "the contractor shall make no claim for additional work, unless the same shall be done in pursuance of an order from the architect, and notice of all claims shall be made to the architect in writing within ten days of the beginning of such work," does not refer to or affect a claim of a subcontractor for additional work done by direction of the architect, who had authority to order it, and in pursuance of a change of plan desired by the owner.

Upon a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under a subcontract to excavate for the cellar of a house, do the grading, and build the foundation walls, the petitioner is not entitled to be allowed for carting away gravel from the cellar, which was done by the city under an agreement with the petitioner that it might have the gravel, which it wanted for roads, if it would carry it off.

PETITION, to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under a subcontract in the erection of a building on the respondent's land in Worcester. Trial in the Superior Court, without a jury, before *Dewey*, J., who found for

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the petitioner; and, at the respondent's request, reported the case for the determination of this court. The facts appear in the opinion.

R. Hoar, for the respondent.

B. W. Potter, for the petitioner.

HOLMES, J. This is a petition to enforce a mechanic's lien for labor, under Pub. Sts. c. 191, and comes here on report. We will take up in their order the points that were argued.

1. The respondent had employed a contractor to build a house upon his land, under a contract which provided that the contractor should "not let, assign, or transfer this contract, or any interest therein, without the written consent of the architect." The petitioner made a written subcontract with the contractor to excavate for the cellar, do the grading about the building, and build the foundation walls, referring to the principal contract. There was no evidence that the respondent knew that the petitioner made the subcontract or did any work, and there was no written consent of the architect. The auditor to whom the case was sent, and the judge who tried the case upon the auditor's report, found that the nature of the contract was such that the contractor, as matter of law, had authority from the respondent to employ the petitioner, and so that the petitioner's labor was performed by consent of the respondent, within the meaning of § 1. The main contention of the latter is that the words quoted above from this contract do not admit of such a finding.

We are of opinion that the finding of the judge was right. The words quoted, literally interpreted, do not refer to subcontracts but to attempted assignments of an interest in the principal contract, a different matter. The literal interpretation is the only sensible one. Of course the contract did not mean that the contractor was to do all the work with his own hands, or that he was to apply to the architect for consent before he bespoke window frames or bricks. It must have contemplated the employment of subcontractors in the usual way. This is the scope of the decision in *Wahlstrom* v. *Trulson*, 165 Mass. 429, 434, which was not intended to suggest that, if this clause was known to the petitioner and means what the respondent contends, it would be immaterial on the question of the latter's consent, or might not withdraw the consent otherwise to be implied from the nature of

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the contract. *Borden* v. *Mercer*, 163 Mass. 7. *Landers* v. *Dexter*, 106 Mass. 531. *Parker* v. *Bell*, 7 Gray, 429.

2. On the question of the amount to be recovered, however, the petitioner's right is not by way of subrogation to the principal contract. *Bowen* v. *Phinney*, 162 Mass. 593. The provision in the latter as to the allowance of claims of the contractor for additional work does not refer to or affect claims like the petitioner's.* A small item for additional work done by the petitioner by direction of the architect, who had authority to order it, and in pursuance of a change of plan desired by the respondent, properly was allowed.

3. The petitioner contends that he should have been allowed a further sum for carting away gravel from the cellar. It is assumed that the petitioner was to have the gravel under his contract, the city of Worcester wanted it for roads, and thereupon the petitioner agreed with the city that it might have the gravel if it would carry it off. The petitioner contends that, as matter of law, he furnished the labor, although the auditor and judge found otherwise. The most natural view of the facts is that the petitioner permitted the city to do the work for its own advantage on its own behalf, not that he employed the city as an agent. In estimating labor furnished under an entire contract for labor and materials, only labor actually performed by or on behalf of the petitioner can be allowed for under § 2, as against the landowner, and it is not enough to make the latter liable that the petitioner by his contract with a third person was bound to see that the labor was performed. The contract is laid on one side as against the landowner, who is not privy to it, and the only question is what the petitioner actually did. We cannot say that the finding was wrong.

Judgment on the finding.

* This provision of the contract was as follows: "The contractor shall make no claim for additional work, unless the same shall be done in pursuance of an order from the architect, and notice of all claims shall be made to the architect in writing within ten days of the beginning of such work."

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COMMONWEALTH *vs.* HENRY T. COATES.

Worcester. October 9, 1897. — October 21, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

License of Dog — Statute — Allegations of Complaint — Evidence.

If one at any time keeps a dog which is not registered, numbered, described, and licensed under Pub. Sts. c. 102, § 80, he is subject to a penalty under § 87 of that statute; and, if the complaint charges such a keeping, it is not necessary to go further in the averments and set forth the particular time when such keeping began. As a matter of pleading, the general averment negativing registration, etc., according to the statute, is sufficient.

Where, on a complaint for keeping a dog in violation of Pub. Sts. c. 102, § 80, on May 1, 1897, and on divers other days and times between that day and July 19, 1897, it being the defendant's duty under the statute to have the dog registered on or before the 30th day of April, the court said, the defendant having suggested that evidence of keepership outside of the time alleged could not be considered, that no such question appeared to be raised at the trial, but that the evidence was clearly competent in order to show that he was not authorized to keep the dog on the first day of May for want of a license previously obtained.

COMPLAINT, for keeping an unlicensed dog. The complaint alleged "that Henry T. Coates of Leominster in said county of Worcester on the first day of May in the year of our Lord one thousand eight hundred and ninety-seven at Leominster in said county of Worcester and on divers other days and times between that day and the nineteenth day of July, A. D. 1897, at said Leominster unlawfully did keep a certain male dog, said dog not being then and there registered, numbered, described, and licensed according to law, said dog being then and there a dog more than three months old, against the peace of the said Commonwealth, and the form of the statute in such cases made and provided."

The defendant, before the impanelling of the jury in the Superior Court, filed a motion to quash the complaint, on the ground that no acts are set forth therein which constitute a crime in that it alleges that the defendant kept a dog on the 1st day of May, 1897, and divers other days between said 1st day of May and the 19th day of July, 1897, when it should have set forth that he kept said dog on or before the 30th day of April, 1897. The motion was overruled, and the defendant excepted.

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At the trial, before *Blodgett*, J., there was evidence tending to show that the defendant was the owner and keeper of a dog previous to May 1, 1897, which he had licensed by a license which expired on April 30, 1897. He continued the owner and keeper of the dog, but took out no new license for the year expiring April 30, 1898, until July 20, 1897. The complaint was made on July 19, 1897. The judge instructed the jury that, if they found the facts to be as above stated, the evidence would warrant the conviction of the defendant; and the defendant excepted. The defendant requested the judge to instruct the jury that, if they should "find that the defendant did keep an unlicensed dog on the days alleged in the complaint, namely, May 1, 1897, and on subsequent days until the 19th day of July, 1897, the defendant nevertheless is not guilty of committing any crime, and cannot be found guilty." The judge refused so to rule, and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. E. Tupper, for the defendant.

H. Parker, District Attorney, & *G. S. Taft*, Assistant District Attorney, for the Commonwealth.

ALLEN, J. The motion to quash was rightly overruled. It was not necessary to charge the keeping of the dog on or before the 30th day of April. If one at any time keeps a dog which is not registered, numbered, described, and licensed according to law, he is subject to a penalty. Pub. Sts. c. 102, §§ 80, 87. The complaint charged such a keeping, and it was not necessary to go further in the averments, and set forth the particular time when such keeping began. As a matter of pleading, the general averment negativing registration, etc., according to law, was sufficient. *Commonwealth* v. *Thompson*, 2 Allen, 507. See also *Commonwealth* v. *Palmer*, 134 Mass. 537. Very many decisions under the statutes relating to intoxicating liquors are to a similar effect.

It appeared that the defendant was the owner and keeper of the dog before the 1st day of May. It was therefore his duty to have the dog registered on or before the 30th day of April. The defendant now suggests that evidence of keepership outside of the time alleged cannot be considered. No such question appears to have been raised at the trial; but the evidence was clearly

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competent in order to show that he was not authorized to keep the dog on the 1st day of May, for want of a license previously obtained.

We have no occasion to consider whether an unlicensed dog bought on the 1st day of May must be registered and licensed before the 30th of the ensuing April.

Exceptions overruled.

HENRY E. GAYLORD *vs.* PAUL PELLAND & others.

Hampshire. September 29, 1897. — October 22, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Reformation of Instrument — Equity — Decree — Bar — Evidence.

If an instrument which requires a seal is by accident or mistake executed without one, a court of equity may grant relief by compelling a seal to be affixed, or otherwise.

A decree in a suit in equity, declaring an instrument purporting to be a mortgage of land void for want of a seal, and the proceedings by which it had been sought to foreclose it also void, is not a bar to a subsequent suit in equity by the holder of the instrument to have it reformed.

If a decree in a suit in equity, declaring an instrument purporting to be a mortgage of land void for want of a seal, recites that "the seal now upon said mortgage was placed thereon after its execution and delivery, and without the knowledge or consent of" the mortgagor, and it is not determined and does not appear who placed it there, or under what circumstances it was so affixed, evidence offered by the holder of the instrument, at the hearing of a subsequent suit in equity to have it reformed, that it was the intention of the mortgagor, at the time the instrument was executed, that there should be a seal upon it opposite his name, is competent.

BILL IN EQUITY, filed in the Superior Court, against Paul Pelland, Josephine P. Pelland, Joseph Martin, and also Henry E. Gaylord, as assignee in insolvency of the estate of said Paul Pelland, alleging the following facts.

The defendant Paul Pelland, to secure payment of his promissory note for $2,450, on or about January 31, 1885, executed and delivered to the Glasgow Company a mortgage of real estate in South Hadley, which was duly recorded.

By a sealed instrument, duly recorded, the Glasgow Company assigned the mortgage to Stephen C. Weld, who, in consideration

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of $1,650, assigned the mortgage to the plaintiff, by an instrument under seal and duly recorded, and the plaintiff is now the owner of said mortgage.

On or about January 20, 1886, the defendant Paul Pelland gave to the defendant Martin a second mortgage of the premises, subject to the encumbrance of the mortgage to the Glasgow Company, and Martin is now the owner of such second mortgage.

The defendant Paul Pelland, on or about July 20, 1887, by the intervention of Henry W. Taylor and by deeds duly recorded, conveyed to the defendant Josephine P. Pelland, who since January 31, 1885, had become his wife, one undivided half of the premises, subject to the mortgage given by him to the Glasgow Company, and Josephine P. Pelland is now the owner of such undivided half of the premises.

On or about February 21, 1894, the defendant Henry E. Gaylord was appointed assignee in insolvency of the estate of the defendant Paul Pelland, and as such assignee now holds the right, title, and interest of the defendant Paul Pelland in the mortgaged premises.

When the mortgage so assigned by Weld was delivered to the plaintiff, it was duly sealed, but it has recently been discovered that, by accident or mistake, no seal was affixed to the mortgage at the time it was signed, acknowledged, and delivered by the defendant Paul Pelland.

The several defendants, being all the persons who have had any interest in the premises since the execution of the intended mortgage, have treated the same as a valid and subsisting lien and encumbrance upon the premises, and have received and taken all their rights and interests in the premises with that understanding, and the same ought to be so regarded.

They, however, pretend and claim that no right or title has accrued to the plaintiff under the mortgage, and that it cannot and ought not to be used by him to convey title to the premises according to the power therein contained.

The defendant Martin has commenced proceedings to foreclose the mortgage so given him by the defendant Paul Pelland, with intent effectually to deprive the plaintiff of all right, title, and interest in and to the premises by virtue of the intended mortgage.

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The prayer of the bill was that the instrument might be reformed so as to be the deed of the defendant Paul Pelland; that the seal of Paul Pelland might be affixed thereto with like force and effect as if it had been attached before the delivery of the instrument; that the defendant Martin might be enjoined from proceeding with the foreclosure of his mortgage, and from assigning the same; and that the defendant Josephine P. Pelland might be restrained from conveying, leasing, or in any way transferring the premises or her title thereto; and for other and further relief.

The answer alleged that all the questions involved in this suit had already been determined by a suit in equity between the same parties, in which the present plaintiff was defendant, and the present defendants, except the assignee in insolvency, were plaintiffs; that the last named suit in equity was referred to a master, who, after hearing the parties, found among other things that "the instrument purporting to be a mortgage under which the defendant made his foreclosure sale, and by virtue of which he now claims title, as offered in evidence before me, appears to be properly sealed. But I find as facts under the third amendment to the plaintiff's bill, that at the time this instrument was originally signed, acknowledged, delivered, and recorded, it was not sealed, and that the seal now on it was attached some time after its execution and without the knowledge or consent of Paul Pelland, the only party who signed it, although in the testimonium clause he purports to set his hand and seal thereto; and consequently this instrument could have no effect, either as a conveyance of, or as a power to convey, real estate; that the so called foreclosure sale was a nullity"; that the instrument therein referred to is the same instrument which the plaintiff seeks to have reformed in the present suit; and that a decree for the plaintiffs was entered in the former suit, which recited that the instrument in question was invalid and void, and ineffectual either as a conveyance or as a power to convey the real estate therein described; that "the seal now upon said mortgage was placed thereon after its execution and delivery and without the knowledge or consent of said Pelland"; and that the attempted foreclosure of the same and sale of the real estate thereunder were nullities and void.

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An amendment to the answer alleged "that the instrument purporting to be a mortgage, and annexed to the plaintiff's bill of complaint, was materially altered and changed subsequently to its delivery by said Pelland to the Glasgow Company, and without his knowledge, consent, or authorization, and that therefore the plaintiff is not entitled to the relief prayed for in his bill of complaint."

The third amendment to the bill in the former suit, referred to in the quotation from the master's report in the answer to the present bill, contained the following allegation: "The plaintiffs further say that the alleged first mortgage, of which the defendant became assignee, and which he afterwards went through the form of foreclosing, was not a valid mortgage, but was invalid, void, and of no effect, because at its execution and delivery there was no seal upon said mortgage."

At the hearing, before *Dewey*, J., no evidence was introduced upon either side except the pleadings, master's report, and the decree in the former suit. The plaintiff offered evidence tending to show that it was the intention of Paul Pelland, at the time of the execution of the mortgage, that there should be a seal upon it opposite his name. To the admission of this evidence the defendants objected, and contended that the decree and master's report in the former case, and the subsequent alteration of the alleged mortgage by affixing a seal thereto, as set forth therein, rendered the offered evidence incompetent and immaterial.

The judge reported the case for the determination of this court, by agreement of the parties. If the evidence was not competent and material, the bill was to be dismissed; otherwise, the case was to stand for further hearing.

R. O. Dwight, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendants.

ALLEN, J. If an instrument which requires a seal is by accident or mistake executed without one, a court of equity may grant relief by compelling a seal to be affixed, or otherwise. *Bernard's Township* v. *Stebbins*, 109 U. S. 341, 349. *Bullock* v. *Whipp*, 15 R. I. 195. *Conover* v. *Brown*, 4 Dick. 156. *Lebanon Savings Bank* v. *Hollenbeck*, 29 Minn. 322. *Springfield Five Cents Savings Bank* v. *Springfield Congregational Society*, 127 Mass. 516. *Chase* v. *Peck*, 21 N. Y. 581.

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The evidence offered, therefore, was clearly competent, unless there was something in the circumstances of the case to deprive the plaintiff of a right to the relief prayed for. The defendants rely on two objections: 1st, that the plaintiff is barred by the former decree; and, 2dly, that after the execution of the mortgage a seal was placed thereon without the knowledge or consent of the mortgagor. But neither of these objections is decisive against the plaintiff.

1. The former decree did not touch the matter of the present suit. It declared that the instrument as executed was invalid and void as a mortgage for want of a seal, and therefore that the proceedings by which it had been sought to foreclose it were also void. The attempted foreclosure was therefore set aside. *Springfield Five Cents Savings Bank* v. *Springfield Congregational Society*, 127 Mass. 516. There was no adjudication upon the question whether the holder of the mortgage was entitled in equity to have it reformed, and the former decree is no bar to the present suit.

2. The decree in the former suit set forth that "the seal now upon said mortgage was placed thereon after its execution and delivery, and without the knowledge or consent of said Pelland," who was the mortgagor. It was not then determined, and does not now appear, who placed it there, or under what circumstances it was so affixed. There is nothing in the bare fact that a seal was thus added which cuts off the plaintiff's right to equitable relief. Cases have often arisen which presented questions of the effect of alterations of different kinds of written instruments under varying circumstances. *Lee* v. *Butler*, 167 Mass. 426. *Church* v. *Fowle*, 142 Mass. 12. *Nickerson* v. *Swett*, 135 Mass. 514. *Holden* v. *Hoyt*, 134 Mass. 181. *Drum* v. *Drum*, 133 Mass. 566. *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196. *Ames* v. *Colburn*, 11 Gray, 390. *Adams* v. *Frye*, 3 Met. 103. But as the circumstances of the alteration in the present case are as yet purely conjectural, we do not now consider how the plaintiff might be affected by possible facts. It is enough to say that upon the case as it stood the offered evidence was competent, and that according to the terms of the report the case should

Stand for further hearing.

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ADDIE F. BABBITT *vs.* SAFETY FUND NATIONAL BANK.

Worcester. October 8, 1897. — October 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Artificial Watercourse — Obstructing Flow — Negligence — Action.

A. owned land adjacent to an artificial watercourse, and B. owned land through which the water flowed after passing A.'s land. B., who was under a contract with C., from whose mill the water flowed through the watercourse over B.'s land, not to make any erection thereon which would interfere with the flow of the water, constructed a grating across the watercourse on his land, and rubbish put into the water negligently or wrongfully by third persons accumulated on the grating, obstructing the flow, and setting the water back upon A.'s land, to his damage. *Held*, that A. could maintain an action therefor against B.

TORT, for erecting and maintaining a barrier in a certain channel, whereby the water was caused to flow upon the plaintiff's premises. Trial in the Superior Court, before *Hardy*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff put in evidence a deed of her premises from one Nixon, dated May 1, 1890, and duly recorded. The premises were situated on the southerly side of Main Street, at the corner of Putnam Street, and on the easterly side of Putnam Street, in Fitchburg.

The defendant was the owner of a block situated on Main Street easterly of the plaintiff's premises, the land of one Cutler however intervening between the plaintiff's land and that of the defendant. The channel in question extended from the wheel pit of the Putnam Machine Company, a point some distance westerly of Putnam Street, through land of the Putnam Machine Company to Putnam Street and under that street by a culvert, and then along the southerly side of the plaintiff's premises, past the Cutler premises, across the lot of the defendant underneath the block of buildings erected by him, through a stone cemented channel, which there was evidence tending to show that the defendant had constructed.

Next southerly of the plaintiff's premises and extending easterly to the defendant's premises was a lot, formerly of one Joseph Cushing, extending westerly to Putnam Street. Four or five

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years before the action was brought, Cushing had built on the northerly side of the channel a wall, which was all or nearly all on Cushing's land. There was evidence tending to show that before the wall was built the channel flowed next to the plaintiff's land.

Charles A. Babbitt, called as a witness by the plaintiff, testified that the plaintiff's block was on Main and Putnam Streets, and extended back to Putnam's raceway, so called; that there was a large wall that separated the plaintiff's premises from the raceway as it now runs; that that wall was built about five years ago; that it extended from Putnam Street to the end of the plaintiff's estate and by it; that before that wall was built the raceway ran right along, washing the shores of the plaintiff's estate until it passed it; that there was a grate on the defendant's land "that went down," and a large timber was put across the whole of the stream, and the bottom of the grate rested on the timber; that the grating leaned up against the wall of the defendant's building; that there were fifty bars in the grating; that when the plaintiff bought the premises the raceway, after it passed her premises, spread out and was wider after it got on to one Crocker's land, Crocker being the grantor of the defendant; that a year or two before Crocker sold to the defendant he put in a wall on each side of the raceway, so that it confined it between two walls; that the defendant took those walls out and put in new ones; that they were very nearly in the same place as the new walls which the defendant put in; that the channel was narrower as the defendant constructed it than as Crocker left it; that the log on which the bottom of the grate rested was imbedded in the bed of the channel; that the top of the log was flush with the bottom of the channel outside of the grating; that the bars in the grating were about a quarter of an inch wide and about an inch thick, and about an inch and a half apart; that the grating covered the whole entrance to the opening under the defendant's block; that the surface water from Putnam Street went into the raceway; that there was an iron grate in Putnam Street through which the surface water from that street would run into the raceway; that before the erection of the grating at the defendant's block, which was in 1894, there never was any trouble with the raceway or canal; that

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boards, paper, chips, and all sorts of stuff, came down and lodged on these bars, and the result was that the refuse, striking against the bars and the boards and whatever there was, would make a dam there and not let water flow through it, but raise the water, which set back and flowed into the cellar of the "old house," so called, on the plaintiff's premises; that that happened very frequently before the time alleged in the declaration, and it was cleaned off by the defendant and the witness; that the defendant, whenever notified, would go there and rake off the grating, and just as soon as the grating was raked off the water would come through and become lower; that the defendant took charge of the grating; that he had seen the defendant's officers at the grating many times; that he had requested the defendant's president and cashier to clean off the grating, and they had done it; that he had cleaned it off himself more than one hundred times; that he had seen the plaintiff's tenants cleaning it off; that there was a general undertaking to keep it clean; that on March 21, 1895, the date alleged in the declaration, between eleven and twelve o'clock in the forenoon, the witness was notified that there was trouble with the grating; that he went there and found that the water was up to the top of the grate, and that it was flowing back and had gone into all the plaintiff's cellars; that the grating was not totally obstructed, but at the top the obstruction was so large it could not get through the grate, and the witness took hold and pulled off some boards and a lot of stuff, and the water lowered considerably; that he had a rake which finally caught down low, and he pulled the rake out, and a big canvas that had followed and lodged up against the grating came out; that he would not undertake to say how large the canvas was, but it was large enough to cover the whole grate; that the canvas came from the defendant's building, which was in process of erection at this time; that the canvas was used for the purpose of covering the brick, as the witness supposed; and that, after the canvas was pulled up, the water lowered instantly.

On cross-examination, the witness testified that there was rubbish of various kinds on the grating; that he did not know who put it there or where it came from; that he could not tell whether the plaintiff's tenants put it there or not, but they might have

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done so; that after the injury complained of the city had cleaned out the channel between Putnam Street and the defendant's building; and that he saw them take out a great many cartloads of stuff, but did not know how much.

The plaintiff called John W. Hart, who was a tenant of one of her buildings, and occupied one of the cellars that was overflowed by the water setting back on March 21. He testified that before the grating was put in the cellar was all right; that after this grating was erected the water came into his cellar, and when the water came in he found rubbish collected on the grating; that he had seen paper, boards, and rubbish lodge there, but he did not know where the rubbish came from; that on March 21, about ten o'clock, his attention was called to the cellar, and the water in it was quite high, — two or three feet; that he went to the defendant bank and notified the president, and he sent a man there; that the grate was covered with water, and it ran against the building; that the water was much higher than its normal height; that they cleaned the grating off, raking off chips, paper, and stuff that had collected there; that he saw them pull off a large canvas which covered the grating; that he saw the canvas about the building before that time; that he had seen them use the canvas at various places on the building; that the water went down immediately after the canvas was removed, and was all out of his cellar in half an hour; that the grating rested on a timber twelve inches square in the bottom of the trench; that he thought the timber was above the bed of the stream; that he thought it was stuck in the bed of the stream very little; and that on that day he saw no other obstruction in the canal than the grating and the things collected on it.

The plaintiff called several other witnesses, who corroborated the testimony of Babbitt and Hart as to the accumulation of rubbish on the grating and the flowing back of the water upon the plaintiff's premises, the removal of the rubbish, and the immediate subsidence of the water.

The defendant put in evidence a deed from the Putnam Machine Company to Joseph Cushing, which conveyed the land next southerly of the plaintiff's premises and of the Cutler lot, and extending from Putnam Street easterly to the land and block

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of the defendant, and some distance south of the premises in question. This deed was dated August 16, 1884, and was duly recorded, and contained the following stipulations:

"Together with all rights, interests, and privileges, if any, which it may have in respect to the racecourse which passes through said land; excepting, however, and expressly reserving the right to use and enjoy a racecourse across said land and to flow water through the same in an aqueduct or channel of the same dimensions as, and in continuation of, the aqueduct now used by it under said Putnam Street; and this deed is upon the express condition that no building or other erection shall be put upon said land so as to interfere with the said right, or with the flow of water aforesaid."

The defendant also put in evidence a deed from Charles T. Crocker to the defendant, dated February 5, 1894, and duly recorded. This deed conveyed a parcel of land bounding northerly on Main Street, easterly on land of one Brigham, southerly on land of Joseph Cushing, and westerly on land formerly of the Putnam Machine Company, now of Cushing, "subject to the right of the Putnam Machine Company to maintain their racecourse across said land and to flow water through the same; and this deed is upon the condition that no building or other erection shall be put upon said land so as to interfere with the said right, or with the flow of water aforesaid."

The defendant called as a witness George Raymond, a civil engineer, who testified that he had lived in Fitchburg forty years, and was city engineer in the years of 1873 and 1874; that there was a sewer put in by the city a few years before, extending from Main Street through Putnam Street to this channel, and emptying into the channel in the Putnam Street culvert; that the grating in question was composed of fifty bars, which were one quarter of an inch thick and one inch wide, and one and a half inches apart; that the bars were so placed that the thin dimension was in the direction of the flow of water; that the bars were five feet in length, and ran up and down; that when the gates at the Putnam Mill wheel were shut the water fell sixteen inches; that on June 16, 1897, he put the grate in, it having been taken out before that time, and that when the mill was running it raised the water one quarter of an inch in the stream; that in

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June, 1896, he made a survey and profile of the channel, and found it filled with various rubbish and mud above Putnam Street on the west, in the Putnam Street culvert, and below the Putnam Street culvert to and into the channel under the defendant's building; and that since June, 1896, the city had taken out a large quantity of that rubbish and material.

On cross-examination, he testified that before the pond was filled there was no defined bed for the channel below Putnam Street; that before the defendant's building was put up, Crocker, the former owner, had enclosed the channel across the lot with two walls, leaving it open at the top; that the north bank along the plaintiff's land was indicated by a low cobble wall, which was buried under rubbish; and that in June, 1897, when he made the measurements referred to, the bed of the channel had been materially deepened and widened by the removal of the rubbish.

The defendant called as a witness Edgar S. Moulton, who testified that he built the defendant's building above the foundation, by a contract furnishing the labor and material therefor, and took possession thereof for that purpose in September, 1894, and retained possession until July, 1895; that Crocker put walls in, in 1893, of granite stone; that above the walls the channel was full of rubbish of all kinds; that he himself put the wall on the northerly side of the channel along the Cutler land and the plaintiff's land for Cushing, in 1891; and that he built a solid wall there.

On cross-examination, he testified that he had nothing to do with the foundation of the defendant's building, but he took it after the foundation was built; and that the channel constructed by the defendant over its lot was in the foundation of the building.

The defendant called David A. Hartwell, city engineer of Fitchburg, who testified that the overflow sewer extended from Main Street through Putnam Street and emptied into this channel under Putnam Street; that this was an extension of a sewer through Oliver Street, entering Main Street on the north side of Putnam Street; that this was intended for an overflow sewer, and there was a catch-basin at Main Street with a ten-inch pipe designed to carry the sewage coming down Main Street and Oliver Street from points west and north of the junction of Putnam

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and Main Streets into the Main Street sewer which runs easterly from Putnam Street; and that when this ten-inch pipe was clogged up, as he had seen it clogged up, the sewage would flow over down Putnam Street into the channel in question.

It was agreed that the wheel in use at the Putnam privilege on March 21, 1895, was a wheel that discharged practically the same amount of water as the wheel in use at the time of the deeds from the Putnam Machine Company to Cushing, and from Crocker to the defendant.

Charles A. Babbitt was recalled, and, in rebuttal, testified that the grating was in place when Moulton began to build; and that he knew the man who had charge of the foundation put in the grating.

The plaintiff also put in evidence in regard to the effect of the water on March 21, 1895, upon her premises.

The defendant asked the judge to rule as follows:

"1. On the evidence in this case the only obligation the defendant was under, with respect to the canal or channel referred to in the plaintiff's declaration, was to allow the Putnam Machine Company to maintain it as a racecourse across the land, and to flow water through the same; and if the defendant provided a sufficient aperture and channel to carry off the water which ordinarily flowed from the wheel and tail-race of the Putnam Machine Company's mill, it would not be liable for any flooding of the plaintiff's premises by water coming from any other source.

"2. If the defendant's channel under its building was of sufficient dimensions, at the time complained of, to carry off the water then flowing from the Putnam wheel through the racecourse, the defendant is not liable to the plaintiff by reason of any flooding caused by water coming from any other source, whether from sewers of the city of Fitchburg or from surface water flowing in the streets or on the surface of the ground and discharged into said channel.

"3. If the dimensions of the channel provided by the defendant were sufficient to carry the water from the mill of the Putnam Machine Company, as it existed in 1884, the defendant is not liable for any obstruction of the stream caused by the discharge into it, above the plaintiff's premises, of sewage or surface water from the sewers of the city or from the streets of the city, or by

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rubbish thrown or carried into the stream by third persons or by causes over which the defendant had no control; and in order to recover, the plaintiff must show that the defendant, by the obstruction alleged, contributed appreciably to the plaintiff's damage.

"4. If the plaintiff suffered any damage by the flooding of her premises, it is necessary for her to show, in order to recover damages in this case of the defendant, precisely what part of her damages was caused by the negligent and unlawful act of the defendant, and if the facts do not disclose what part of the whole damage was caused by the defendant's negligent act, there can be no recovery in this case.

"5. The defendant was in no way bound to provide for the discharge of water thrown or carried into said channel by the sewers of the city, or by the channels on the surface of the streets, nor for water discharged from the premises other than the Putnam Machine Company's mill; and if water was discharged from said sewers or from streets or other premises, or if obstructions in the nature of rubbish thrown into said stream actually caused the water to set back upon the plaintiff's premises in any appreciable degree, the plaintiff cannot recover in this case unless she shows what portion of the flooding was caused by the negligent acts of the defendant.

"6. There is no evidence that the screen or grating in and of itself caused the water to set back on the plaintiff's premises, but only that rubbish of various kinds accumulated against the screen or grating caused it, and there is no obligation of the defendant shown to keep the stream clear, or to provide for the passage of rubbish thrown or carried into the stream without its fault, and therefore the plaintiff cannot recover.

"7. If the defendant would be liable for any negligent failure to remove obstructions placed by third persons upon the grating or screen, there is in this case no evidence of any neglect on the part of the defendant to remove the obstructions, which, on the evidence, caused the water to rise and overflow the plaintiff's premises."

The judge declined to give the rulings requested, and instructed the jury, among other things, as follows:

"It is for you to find whether this was a watercourse, and I

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instruct you, as a matter of law, that, so far as the facts are concerned in this case, her [the plaintiff's] rights would be the same under an artificial watercourse as under a natural watercourse; that she would be entitled to be protected from any obstruction of this artificial watercourse by the wrongful act, or negligent act, of the proprietors of land below.

"Now, the next question that arises in this case is, What has the defendant done with reference to the use of this artificial watercourse? Has the defendant erected a barrier, or anything that could be called a barrier, to obstruct the flow of this stream? Has the defendant, in connection with the keeping of an aperture open for the passage of water, done anything which would have a tendency to obstruct the natural flow of the stream, and has the defendant maintained that structure? Was this grating erected or maintained by the defendant previous to March 21, 1895? The court, as you heard, was called upon to say there was no evidence for you to consider upon that point. That is a question of fact. It is not a question before you simply whether or not the defendant has erected this grating or screen, but also you are to consider, if you do not find that the defendant by its actual officers or agents erected it, whether or not the defendant has maintained that screen. If you should find it maintained it, even though it had not erected it, on that issue it would be your duty to find for the plaintiff. . . .

"If you are satisfied, upon all this evidence, that there is no evidence which did connect the defendant with the maintenance or erection of the dam, then it will be your duty upon that issue to find for the defendant. . . .

"The next proposition is, if you find that the defendant did erect or maintain this structure, whether the defendant did anything that was wrong in its nature, and whether by the act of the erection of the screen, together with the acts of any other parties, or by reason of the fact that rubbish collected here, the defendant is liable. And that is one of the very important things in this case, and depends mostly upon questions of law. . . .

"Now, if you find that the defendant was the owner of this building, (and there seems to be no doubt upon that point,) or if you find that the defendant was maintaining this screen, it is

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for you to say, under the instructions of the court, whether or not the defendant caused damage to the plaintiff by such maintenance.

"You have evidence here tending to show that the defendant undertook certain obligations with reference to the Putnam Machine Works. That obligation is an obligation created by contract. If you find that the plaintiff was the owner, upon the bank of the stream above, the defendant not only undertook an obligation by contract with the Putnam Machine Works, but it was its duty to see to and manage its property so as not to affect or injure the rights of others upon the same stream above. It had no right, by reason of the fact that it was under certain contract obligations with the Putnam Machine Works, to so manage this opening as to cause the artificial stream . . . to overflow to the injury of the plaintiff. . . .

"Now the first question is, Was the method of maintaining this opening by the screen a proper method? Was this grate a proper aperture or opening, under the circumstances? It is argued by the defendant, that it had the right to protect its own land from the various substances being carried under that building. That is true. It had the right to do that, but it did also undertake to become liable to anything that might occur if it attempted to carry out that right. If it chooses to put that screen there for the purpose of protecting itself from dead animals that might float down the stream, it has no right, under the circumstances, to do it in such a way as may cause an overflow of the water to the damage of the proprietors above. It has to take the expense of settling all liabilities for damage that may arise. . . .

"If you find on that evidence that the defendant did have some knowledge and some reason to believe that such obstructions would occur, that is proper evidence for you to consider on the question whether or not this was a proper method, if the defendant was under the duty to protect the rights of others upon the same stream.

"Now, your attention has been called here to the liability of the defendant, by reason of the fact that other parties may have put obstructions into that stream. It would be possible for you to find, and very probable that you would find, on this evidence,

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that the act of erecting the screen alone would cause no damage to this plaintiff. It may also be probable and possible for you to find, if there were no screen there, that these foreign substances, or rubbish, would have floated down and would have caused no damage to the plaintiff.

"It is a question for you to find, whether or not, by the combination of circumstances, that is, by the location of the screen across this stream, and by the lodging of rubbish against it, whether that combination has caused injury to the plaintiff. Those are the main questions in the case, whether or not this defendant is liable by reason of the fact that some other parties have combined with it, and by the result of that combination, not by any accident or arranged plan beforehand, but by the result of certain facts, that is, the effect of the screen and the result of the fact that certain articles went into the stream that caused this obstruction, the defendant would be liable. . . .

"If the injury was caused to the plaintiff by the erection of this barrier, taken in connection with the act of a third party, the acts of the defendant and the third party acting in their effect together, then, although no injury would have happened by the acts of either alone, the defendant would be liable. The defendant has no right so to maintain this opening, or permit it to be so continued, as to flood the land of the plaintiff, but is bound to keep open sufficient outlet for such waters. If, after the defendant had made this culvert, with the necessary outlet for waters sufficient, other parties with the knowledge of the corporation officers did close such outlet, and damage was thereby occasioned to the plaintiff which she would not have suffered but for the existence of the grate as allowed to be maintained by the defendant, then the defendant would be liable. . . .

"Then, an important question for you to consider is, if you find that this obstruction was caused by the rubbish that collected against this grate, whether or not the defendant used due diligence to remove the same. . . . If you find that the defendant or its officers have used the diligence of a man of ordinary and average prudence under the circumstances, it would be your duty to find for the defendant. But if the defendant has not used that diligence, or has not used that care which men of

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ordinary prudence would use under the circumstances, then it would be your duty, if you found for the plaintiff on the other issues in the case, to find for the plaintiff.

"A question has arisen in this case, if you find for the plaintiff on the other issues, as to the question of damage. Upon that point your attention has been called to the condition of the bed of that stream, as to its connection with the sewer of the city, or as to the chances of its connection with any surface drainage that may arise. If you should find, on the evidence in this case, that the damage to these premises was caused by the condition of the channel, that is, if it was so filled up with ashes or other matter on March 21 as to affect the rights of the plaintiff, or if you find that on that date there was any discharge to a great amount from the sewer of the city so as to cause this overflow upon the plaintiff's land, or any discharge of surface water, the plaintiff would not be entitled to recover for damages suffered by reason of her own conduct in filling up that stream, nor would she be entitled to recover any damages by reason of the discharge of the sewers or of surface water into that stream so as to fill up her cellar. . . . If you find there was evidence of such a discharge, and that the defendant contributed by its act to the increase of the volume of water that was discharged upon the plaintiff's land, then the plaintiff would be entitled to recover the precise amount of damage caused by the defendant's act. The plaintiff would not be entitled to recover from the defendant what damage was caused to it by the acts of the city or the fact that sewers passed through that street and discharged its sewage in such a way as to fill up the stream."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. P. Goulding, for the defendant.

J. E. McConnell, for the plaintiff.

KNOWLTON, J. The evidence tended to show, and the jury found, that the plaintiff was the owner of land adjacent to a watercourse; that the defendant owned land through which the water flowed after passing the premises of the plaintiff; that the defendant was under a contract with the Putnam Machine Company, from whose mill the water flowed through the watercourse over the defendant's land, not to put any building or other erec-

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tion on the defendant's land in such a way as to interfere with the flow of the water, and that it constructed a grating across the watercourse near the line of its land, which obstructed the flow and set the water back upon the plaintiff's land to her damage. That the plaintiff's premises were so situated as to be likely to be injured if the water was set back, and that the defendant, under its contract with the Putnam Machine Company, owed a duty to the plaintiff and other landowners similarly situated, was not questioned.

The evidence tended to show that the grating constructed by the defendant would not have materially obstructed the flow of water if the water had been clear, and that the trouble came from rubbish, including a piece of canvas, that accumulated on the grating and prevented the passage of the water.

The only exceptions were to the instructions and the refusals to instruct in regard to the duty of the defendant in reference to substances floating in the water which were put there by third persons negligently or without right. The defendant contends that, under its contract with the Putnam Machine Company, it is not obliged to provide for the flow of water in which rubbish thrown or carried into the stream without its fault is floating in such a way that it would accumulate and obstruct the flow if a screen were constructed to stop the passage of the rubbish. The presiding judge instructed the jury, in substance, that if the screen was an obstruction which might be expected to set back the water of the stream under such conditions as would be likely to arise, and as the defendant might reasonably anticipate and provide against, it would be no defence that these conditions arose from the negligent acts of third persons, without which the injury would not have happened. He left it to the jury to determine whether the defendant adopted a proper method of providing for the flow of water in connection with the foreign substances that were in it, and told them that if the defendant or its officers used the diligence of ordinarily prudent men under the circumstances they must return their verdict in its favor.

We do not find that the rights of the defendant were prejudiced by the instructions given, or by the refusal to give the instructions requested. It was plainly the duty of the defendant to refrain from putting obstructions in the stream which

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would be likely to set back the water in the condition in which it might reasonably be expected to come, even though its condition might be caused in part by the negligence of other persons. *Lawrence* v. *Fairhaven*, 5 Gray, 110. *Salisbury* v. *Herchenroder*, 106 Mass. 458. *McCauley* v. *Norcross*, 155 Mass. 584. *Smith* v. *Faxon*, 156 Mass. 589.

Although the watercourse was artificially constructed, it was rightfully located and maintained. The Putnam Machine Company had a right to have the water flow on without obstruction. The defendant had entered into a contract to refrain from obstructing it. Everybody whose property was liable to be affected by setting back the water had a right to exemption from disturbance by an interference with its flow. It is immaterial whether the plaintiff had acquired rights by prescription. The liability of the defendant in reference to obstructions caused by it which would naturally injure the plaintiff's property was the same as it would have been if the parties had been riparian proprietors upon a natural watercourse. If there was any inaccuracy in any of the instructions, it did the defendant no harm.

Exceptions overruled.

WILLIAM H. WILKINSON *vs.* BLOUNT MANUFACTURING COMPANY.

Suffolk. December 1, 2, 1896. — October 23, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Breach — Waiver — Rescission — Equity — Specific Performance — Decree — Damages.

A waiver of one breach of a contract cannot be considered a waiver of a subsequent breach.

It seems, that if one party to a contract, immediately after he receives notice from the other party of a rescission of the contract for breach of a covenant to pay for goods within a time limited therein, pays what is due, and the former receives the money, this will be a waiver of the breach, unless he gives notice that he does not intend to waive his right to terminate the contract.

At the hearing of a bill in equity for specific performance of a contract, by which the plaintiff covenanted to pay for goods furnished by the defendant within

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sixty days from their delivery, and which provided that "upon the breach of any of the covenants herein contained by either party, the other party may terminate and rescind this contract," it was found that the plaintiff, in a letter in reply to a notice by the defendant that he rescinded the contract for breach of the covenant above named, "inclosed a bank check for the amount then due and payable, according to the books of both parties," for all goods not paid for which had been delivered to him sixty days previously; but it was not found that the defendant received the check, or what became of it, nor did it appear whether, if he received it, he took it conditionally or unconditionally. *Held*, that there was not enough shown to amount to a waiver.

One party to a contract, by committing a breach of it, does not lose the right to rescind the contract for a previous breach committed by the other party while both were acting under it as an existing contract, and the latter, who does not seek to rescind it, cannot maintain a bill in equity for specific performance of the contract. BARKER, J., dissenting.

BILL IN EQUITY, filed September 6, 1895, for specific performance of a contract, and for an injunction. Hearing before *Barker*, J., who entered a decree, denying the prayers for specific performance and for an injunction, and retaining the cause for the purpose of assessing damages for breach of the contract by the defendant, and of enforcing payment thereof; and both parties appealed to the full court. The facts appear in the opinion.

C. H. Hanson, for the defendant.

H. W. Chaplin, (*G. B. Upham* with him,) for the plaintiff.

LATHROP, J. 1. The first question presented in this case is whether on the facts found it can be said, as matter of law, that the defendant had, on June 26, 1895, waived the right to rescind the contract into which it had entered with the plaintiff on December 7, 1889. By the terms of the contract, the plaintiff covenanted to pay for the goods furnished by the defendant within sixty days from their delivery. It was further provided, "Upon the breach of any of the covenants herein contained by either party, the other party may terminate and rescind this contract." On June 26, 1895, the defendant gave written notice to the plaintiff that it rescinded the contract for breach of this covenant. It appears from the findings of fact, that at this time the plaintiff was indebted to the defendant for goods delivered under the contract during the months of January, February, March, and April, and for which the plaintiff had failed to pay within sixty days from delivery. It further appears that the defendant had, from time to time, up to and on April 13, 1895,

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accepted, without protest or reservation, payment for all goods delivered to the plaintiff before January 1, 1895. It is only as to these goods so settled for that the decree states that the defendant had waived its right to rescind the contract. We do not understand that the decree in favor of the plaintiff proceeds upon the ground of waiver; but, as the plaintiff contends that there was a waiver, we will briefly consider the question.

As the goods were to be furnished from time to time, there was imposed a continuing liability to pay for each lot within sixty days from delivery thereof. Undoubtedly if the defendant received payment for any lot after the amount was due, it could not rescind the contract for the default in paying for that lot. But a waiver of one breach cannot be considered a waiver of a subsequent breach.

In *Thompson* v. *Knickerbocker Ins. Co.* 104 U. S. 252, 259, an action on a policy of insurance, the defence was that the policy had ceased to be of effect because an annual premium, for which in part a note had been given, had not been paid, the policy containing a clause that the omission to pay the annual premium on the day named should cause the policy to be void. The plaintiff filed a replication, setting up a usage and custom of the defendant not to demand punctual payment, but to give thirty days' grace; that the defendant had repeatedly done so with the plaintiff and others, and that this led the plaintiff to rely on such leniency in this case. This replication was held to be bad, and it was said by Mr. Justice Bradley, in delivering the opinion of the court: "This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of 'leniency.' It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come." See also *Bleecker* v. *Smith*, 13 Wend. 530, 534; *Williams* v. *Dakin*, 22 Wend. 201, 209; *Hunter* v. *Daniel*, 4 Hare, 420; *Muston* v. *Gladwin*, 6 Q. B. 953; *Flower* v. *Peck*, 1 B. & A. 428.

Further, on the question of waiver, the bill alleges that, upon receipt of the notice sent by the defendant rescinding the contract for non-payment of the goods within sixty days, the plaintiff immediately wrote and delivered to the defendant a letter,

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enclosing a check for the full amount due, "which payment was duly received and receipted for by the defendant." This is denied by the answer. It would seem that if the plaintiff, immediately after he received the notice, paid what was due, and the defendant received the money, this would be a waiver of the breach, unless it gave notice that it did not intend to waive its right to terminate the contract. See *Tuttle* v. *Bean*, 13 Met. 275; *Collins* v. *Canty*, 6 Cush. 415; *Kimball* v. *Rowland*, 6 Gray, 224; *Miller* v. *Prescott*, 163 Mass. 12; *Hammacher* v. *Wilson*, 26 Fed. Rep. 239, 241; *Platt* v. *Fire Extinguisher Manuf. Co.* 59 Fed. Rep. 897.

But the decree does not proceed upon this ground, and the finding of fact is merely that the plaintiff in his letter in reply to the notice "inclosed a bank check for the amount then due and payable, according to the books of both parties, for all such door checks not paid for as had been delivered to him sixty days or more previously." It is not found that the defendant received the check, or what became of it. Nor does it appear whether the defendant, if it received it, took it conditionally or unconditionally. What is stated is not enough to amount to a waiver.

2. The decree further states that the defendant, on June 27, 1894, made an agreement with the Corbin Company of Connecticut, with reference to said patents and said patented articles, and that the making of this was a breach of the defendant's contract with the plaintiff, and caused him damage; that, on June 13, 1895, the defendant made an agreement with reference to said patents and said patented articles and said Corbin Company contract, with the Yale and Towne Manufacturing Company of Connecticut, and that the making of this agreement by the defendant was a breach by the defendant of its contract with the plaintiff, and caused the plaintiff damage; and that, by committing these breaches of its contract of December 7, 1889, for any breach thereof by the plaintiff committed after the defendant had itself broken the agreement, the defendant on June 26, 1895, had no right to rescind said agreement.

It appears by the findings of fact that the goods contemplated by the contract of December 7, 1889, were door checks; and that there was upon the market a competing door check known as

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the Corbin door check, manufactured by P. and F. Corbin, a Connecticut corporation. The Corbin check involved some of the material features of the Blount check; and during a considerable time, down to June 27, 1894, litigation was in progress between the defendant and the Corbin Company as to the patents used in their respective door checks. On June 27, 1894, the defendant, without the plaintiff's knowledge, entered into a written contract with the Corbin Company, and the provisions of that contract were carried out by the parties thereto; and under the arrangement thus made, the Corbin Company was allowed by the defendant to sell the Corbin door check in New England, in competition with the sales there by the plaintiff of the Blount check, to the damage of the plaintiff.

By the terms of the agreement between the defendant and the Corbin Company, the parties agreed to share between them the profits arising from the manufacture and sale of liquid door checks. The defendant also, reciting that it was the owner of certain letters patent, licensed the "Corbin Company, its successors and assigns, during the life of this agreement, to make, use, and sell the inventions and improvements described and claimed in said letters patent, and each of them."

By the terms of the agreement between the plaintiff and the defendant, dated December 7, 1889, the defendant granted to the plaintiff, for the term of ten years, "the exclusive right and license within and throughout the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut to sell for use and resale said patented articles and all improvements hereafter made upon the same, except that the right of said licensee to sell said patented articles to railroad companies for use in passenger cars shall not be exclusive nor confined to the New England States, but shall be a concurrent right with the party of the first part [the defendant], and all of its other licensees to sell said patented articles to railroads for use in passenger cars in any part of the United States whatsoever."

The defendant further agreed not knowingly to sell any of said patented articles to any other person for sale or for use in New England, except for the use of railroad companies in passenger cars, and to use every effort to prevent the sale

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of said patented articles in New England by others than the plaintiff.

The contract by the defendant with the Yale and Towne Manufacturing Company, dated June 13, 1895, constitutes the latter its exclusive sales agent, both in the United States and foreign countries, on and after July 1, 1895. The agent agrees to purchase from the defendant, on September 1, 1896, all its machinery, tools, patterns, and fixtures. The eleventh clause of the agreement is as follows: "That said Yale and Towne Manufacturing Company shall treat equitably all the existing arrangements between the Blount Company and its present selling agents which may be in effect on and after July 1, 1895, but that said Blount Company, if requested by said Yale and Towne Company, shall terminate any of said contracts whenever such action is permissible by the terms of any contract, or because of a violation of its terms by any of said agents."

The presiding justice also made this finding of fact: "It had been agreed between the defendant and the Yale and Towne Manuacturing Company, before the contract was actually executed, that the defendant should in some way or other get rid of the plaintiff by cancelling his contract."

So far as the contract made by the defendant with the Yale and Towne Manufacturing Company is concerned, it is difficult to see wherein the making of it constituted any breach of the contract entered into between the plaintiff and the defendant. While the making of it apparently antedates, by a few days, the giving of the notice of rescission, yet the contract was not to take effect until the first of the next month; and if the defendant had a right to rescind the contract made with the plaintiff, the making of the contract with the Yale and Towne Manufacturing Company is immaterial to the case. Moreover, before the date of this contract, the plaintiff had broken his contract with the defendant, by not paying for the goods within sixty days of their delivery to him.

If, however, we assume, without deciding, that these contracts of the defendant with the two corporations constituted breaches of the contract between the parties to this action, and would have justified the plaintiff in rescinding the contract, we know of no principle of law which warrants the conclusion reached

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by the decree, that the defendant has lost the right to rescind for a breach committed by the plaintiff, while both parties were acting under the contract as an existing contract. In fact, the plaintiff at the present time does not seek to rescind the contract, but to have it specifically enforced. If the defendant cannot rescind for the reason that there has been a previous breach of the contract by itself, then the contract must be enforced, without any right of rescission by the defendant, and it would be compelled to furnish goods to the plaintiff, and its only remedy would be an action at law for the price. This would not be the contract made by the parties.

It is found that the plaintiff did not have knowledge of the Corbin contract until after the filing of the bill in this case. But he has not since sought to rescind the contract on this account, or to recover damages for this alleged breach of the contract of December 7, 1889. He still seeks specific performance of the original contract, which he has broken. As he has taken no action on account of the Corbin contract, there is no reason why the defendant should not be allowed to enforce the covenants contained in the contract between the parties, leaving the plaintiff to his action at law to recover damages for any breach of any covenant on the part of the defendant, if he is entitled to any, as to which we express no opinion. See *Standard Button Fastening Co.* v. *Harney*, 155 Mass. 507; *Standard Button Fastening Co.* v. *Ellis*, 159 Mass. 448; *Dingley* v. *Oler*, 117 U. S. 490, 503; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 264; *Foss-Schneider Brewing Co.* v. *Bullock*, 59 Fed. Rep. 83, 87, 88; *McGregor* v. *Ross*, 96 Mich. 103; *Robinson* v. *Lake Shore & Michigan Southern Railway*, 103 Mich. 607; *Avery* v. *Bowden*, 5 E. & B. 714.

In the opinion of the majority of the court, the decree must be set aside, and the bill dismissed. *So ordered.*

BARKER, J. The evidence is not reported, but the decree states certain facts which were found by the justice who heard the case, and these should be taken to be true in dealing with the decree. One of these is, that the making of the contract with the Corbin Company, on June 27, 1894, was a breach of the defendant's contract with the plaintiff which caused him

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damage. Another is that the making of the Yale and Towne contract of June 13, 1895, was a breach of the defendant's contract with the plaintiff, which caused him damage.

Then it is said in the decree that by these breaches of the defendant's contract "the defendant lost its right to rescind the agreement of December 7, 1889, for any breach thereof by the plaintiff committed after the defendant had itself broken the agreement, *and, on June* 26, 1895, *had no right to rescind said agreement.*" The first part of this declaration is no doubt too broad. If the agreement is to be enforced, it must be enforced with all its terms. But the decree does not enforce the agreement, but retains the bill for the purpose of awarding damages for the breaches found. The suit is in equity, and in equity the defendant had no right to rescind on June 26, 1895, as stated in that part of the decree in italics above. The situation was this. The defendant, having given to the plaintiff the sole right to sell its goods in New England, secretly gave to others the same right, and, to make this fraud upon the plaintiff successful, attempted to exercise its power of rescission. To my mind, there could be no stronger case for the exercise of the power of a court of equity to prevent the consummation of a fraud, and that power should be used in this case. If the agreement did not involve the carrying on of a factory and an extensive business which a court practically cannot order, I should say that the plaintiff might have specific performance. As it is, the attempted rescission should be annulled, because part of an attempted fraud, and the plaintiff's damages should be assessed.

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WESTFIELD CIGAR COMPANY *vs.* INSURANCE COMPANY OF NORTH AMERICA.

SAME *vs.* MERCHANTS' INSURANCE COMPANY.

SAME *vs.* TEUTONIC INSURANCE COMPANY.

SAME *vs.* RELIANCE INSURANCE COMPANY.

SAME *vs.* CHESHIRE COUNTY MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* SPRING GARDEN INSURANCE COMPANY.

Hampden. September 29, 1897. — October 25, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Fire Insurance — Description of Premises — Law and Fact — Principal and Agent — Action — Defence — Exceptions — Evidence.

Insurance against fire was effected by A. on goods "contained in brick block situated Nos. 82–90 W. Street." A. occupied the fifth story over stores numbered 84 to 90 on W. Street, and also the fifth story over a store numbered 80 on the same street, the latter being used as his warehouse. The only entrance to these premises from the street was by a doorway numbered 82 on W. Street. In an action by A. upon the policy, the evidence showed that his rooms were part of a large brick block on W. Street, all of which belonged to one owner, and which, by means of alterations made by him long before the policy was written, had become one building commonly known as "W. Block"; and that the owner, without authority, had substituted the number 80 for 82, which was the official city number of that part of the building under A.'s warehouse. *Held*, that it was a question for the jury whether the goods contained in the warehouse were covered by the descriptive clause in the policy.

In actions upon several policies of insurance, where it appears that the agent of one of the defendants acted as broker in procuring the policies written by the other defendants, no exception lies to the refusal to rule that he was the agent of the plaintiff in obtaining the insurance, if the instruction given made him the plaintiff's agent as to all the defendants except the one of which he was agent.

If an insurance company, without referring to a part of its policy called "reference clause," after receiving a proof of loss, admits its liability for the loss upon all property except that contained in a certain room, and denies its further liability solely because the policy did not cover the property in that room, it is not entitled, in an action upon the policy, to a ruling that the plaintiff cannot recover because the "reference clause" has not been complied with.

Where the defence to an action upon a policy of insurance against loss by fire is that the property in a certain room was not covered by the words in the policy "contained in brick block," the plaintiff, to show that his rooms were part of a single brick block, may show its construction, ownership, appear-

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ance, and use, and that it bore one name, and was commonly designated by that name.

An objection to a question to a witness, if on the ground of its form, must be so stated when taken in order to be available upon exceptions.

An exception to the admission of a question to a witness, where his title is only incidentally involved, whether he is the owner of a building, will not be sustained, if the ground of the objection is that his deed and not his oral statement is the proper evidence of ownership, and is not stated at the time, especially if the deed is afterwards put in evidence.

A city ordinance as to street numbers is competent, in an action upon a policy of insurance against loss by fire on goods in a certain building, on the question whether the true official number of that part of the building in which some of the goods were contained was a number other than that appearing there; and the testimony of the city engineer as to the official numbering under the ordinance, with the office maps or plans from which the original numbers, and any changes officially made, can be ascertained by inference, is also competent, there being no formal record of numbers kept.

In an action upon a policy of insurance against loss by fire on goods "contained in brick block situated Nos. 82–90 W. Street," the defence was that goods in a certain room over a store numbered 80 on W. Street were not covered by the policy; and it appeared that the only entrance to the premises from the street was by a doorway numbered 82 on W. Street. A witness was asked whether there was a general custom among insurance agents in that city as to "distinguishing in insurance policies by numbers all lofts and tenements that are up stairs," and, upon answering in the affirmative, was asked what the custom was, to which he replied, "Generally go by the entrance number, those up stairs." *Held*, that the question was competent, and, in the absence of any special request as to the answer, its meaning and weight were for the jury.

SIX ACTIONS OF CONTRACT, upon policies of insurance against loss by fire on property of the plaintiff in Springfield. After the former decision, reported 165 Mass. 541, the cases were tried together in the Superior Court, before *Sherman*, J.

The jury returned a verdict for the plaintiff in each case; and the defendants alleged exceptions, which appear in the opinion.

W. H. Brooks, (*W. Hamilton* with him,) for the defendants.

W. H. McClintock, for the plaintiff.

BARKER, J. Since the former decision of these cases, reported 165 Mass. 541, they have been again tried, with verdicts for the plaintiff, and they now come before us upon exceptions taken by the defendants at the second trial.

In the former decision it was held that the jury would have been warranted in finding that under the descriptive clauses "contained in brick block situated Nos. 82–90 Worthington St.," and "contained in brick block situate Nos. 82 to 90 Worthington St.," all the rooms occupied by the plaintiff in the fifth

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story were merely a part of a large block, and that the goods in the warehouse room, which was over that part of the block which bore the number 80, and the access to which was through an entrance which bore the number 82, were covered by the descriptive clause; and also that, there being evidence that the portion of the building which upon the street actually bore the number 80 was in fact, by the official numbering of the city authorities, number 82, the official number having been changed by the owner without authority, such a substitution would not bind the plaintiff in these actions, and that he was entitled to go to the jury upon the ground that number 80 was the correct and official number of the warehouse.

At the second trial there was abundant evidence to show that the plaintiff's rooms were part of a large brick block extending upon Worthington Street some three hundred feet from Main Street, all of which belonged to one owner, and which by means of alterations and changes made by him some years before the writing of the policies, had become one building commonly known as "Wight Block." There was also evidence that the official city number of that part of the building under the warehouse was number 82, and that the number 80, which it in fact bore, had been substituted for its official number without authority. It was therefore, under the former decision, a question for the jury whether the goods in the warehouse room were covered, and the ruling requested by the defendants, that, upon the whole evidence the plaintiff was not entitled to recover more than the amount tendered, which did not include the loss on goods in the warehouse room, was rightly refused.

The exception to the refusal to rule that Warriner, the agent of one of the defendants, and who acted as a broker in procuring the policies written by the other defendants, was the agent of the plaintiff in obtaining the insurance, is not argued upon the defendants' brief. The instruction given made him the plaintiff's agent as to all the companies, except the company of which he was agent, and this exception must be overruled.

The special request in the case of the Cheshire County Company, that the plaintiff could not recover against it because the terms of that part of its policy called "reference clause" had not been complied with, is not argued upon the defendants' brief.

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The bill of exceptions shows that, without referring to the clause named, the company, after receiving the proof of the loss, admitted its liability for the loss upon all the goods except those in the warehouse room, and denied its further liability solely because its policy did not cover the goods in that room. This exception is overruled. See *Reed* v. *Washington Ins. Co.* 138 Mass. 572; *Badenfeld* v. *Massachusetts Accident Association*, 154 Mass. 77.

The remaining exceptions are to the admission of evidence introduced by the plaintiff to show that his rooms were merely part of a single brick block, and that the warehouse room was officially numbered 82, and that it was known under that number in plans and rate-books used by the companies in writing risks. We find no error in the admission of this evidence. Whether the whole structure was in fact one brick block, and but one building, depended in part upon its construction, its ownership, its appearance, and its use; and it was competent to show all these circumstances, as well as the fact that it bore one name, and was commonly designated by that name. That some of the questions may be open to nice criticism as to form, is not a ground for sustaining an exception to the evidence, because the objection was not put upon that technical ground at the trial. If it had been put upon that ground, the questions would, of course, have been so changed as to avoid any sound objection upon that score. The same reason applies to the exception to the question to the owner of the block, as to whether he owned the building which had been spoken of as the Wight Block. Title by deed must ordinarily be proved otherwise than by the oral testimony of the owner. But when the witness was asked, in a case where his title was only incidentally in question, whether he was owner, if the defendants' objection was founded upon the fact that his deed and not his oral statement was the proper evidence of ownership, the ground of the objection to be now available should have been stated. Besides this, the deed itself was afterwards put in. The city ordinance as to street numbers was competent upon the question whether the true official number of that part of the block in which was the warehouse room was 82. The ordinance tended to show that there was an official numbering by the city authorities. The testimony of the city engineer as to the official

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numbering under the ordinance with the office maps or plans from which the original numbers and any changes officially made could be ascertained by inference was so far as appears the only evidence obtainable, as it is not shown that any distinct record of numbers was kept, and the ordinance requires no such record, but only that the city engineer should assign the numbers. There being evidence tending to show that the numbers officially assigned had been changed, it was of course competent to show by whom the substitution had been made, and that it had not been done by the city engineer or under his sanction. The city engineer being in charge of the office, and having the custody of the plans which showed the action of his predecessor in assigning numbers, could properly testify as to that action, the plans being produced and explained in connection with his testimony. More can hardly be required as to matters of which no formal record is required or kept.

The question as to a custom was competent, and in the absence of any special request as to the answer, its meaning and weight were for the jury.*

No question of the competency of the rate-books and insurance plans is raised. Their effect was for the jury.

Exceptions overruled.

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* The evidence was as follows:

"*Q.* I will ask you whether or not there is a general custom among insurance agents in Springfield as to numbering, distinguishing in insurance policies by numbers all lofts and tenements that are up stairs? *A.* Yes, sir.

"*Q.* What is that custom? *A.* Generally go by the entrance number, those up stairs."

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JAMES DOWDELL, petitioner.

Suffolk. September 7, 1897. — November 5, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Habeas Corpus — Statute — Constitutional Law — Commitment of the Insane.

The provisions of Pub. Sts. c. 87, § 12, as amended by St. 1894, c. 195, and § 13, as amended by St. 1894, c. 498, and St. 1895, cc. 286, 429, relating to the commitment of the insane, do not violate the provisions of the Declaration of Rights, Article 12, or the Fourteenth Amendment to the Constitution of the United States, and are constitutional.

PETITION, filed August 6, 1897, for a writ of *habeas corpus*. Hearing before *Lathrop*, J., who ordered the petition to be dismissed, and, at the petitioner's request, reported the case for the determination of the full court. The facts appear in the opinion.

J. J. McCarthy, for the petitioner.

F. T. Hammond, Assistant Attorney General, for the Commonwealth.

ALLEN, J. The only ground for the petitioner's discharge which is set forth in the petition, or relied on in argument, is that the provisions of statute under which he was committed are unconstitutional, as being in violation of Article 12 of the Declaration of Rights, and of the Fourteenth Amendment to the Constitution of the United States. The former provides that no subject shall be deprived of his liberty but by the judgment of his peers, or the law of the land. The latter, that no State shall deprive any person of liberty without due process of law.

So far as the Declaration of Rights is concerned, it has been twice determined that a person who is in fact insane is not entitled to be discharged from a hospital on *habeas corpus*, provided the court is satisfied that the restraint and treatment there will be beneficial to him. *In re Oakes*, [1845] 8 Law Rep. 122. *Denny* v. *Tyler*, 3 Allen, 225. In both of these cases, the person was committed without any previous hearing, and without the order of any judge. It was held that the provision of the Declaration of Rights is not of universal appli-

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cation, and that it does not entitle an insane person to be set at liberty, if restraint is proper under the circumstances of the particular case.

In the present case, it must be assumed from the petition, report, and argument, that the petitioner is in fact insane, and that the restraint and treatment of the hospital are beneficial to him. The case therefore falls directly within the decisions cited.

As a matter of construction, the same considerations would apply to the Fourteenth Amendment of the Constitution of the United States. If, however, the language of that Amendment should be deemed applicable to cases of insane persons who are held under a wholesome and beneficial restraint at the instance of their relatives or friends, then it would be necessary to determine whether the petitioner is deprived of his liberty without due process of law. He was committed to the hospital, under the provisions of Pub. Sts. c. 87, § 12, as amended by St. 1894, c. 195, and § 13, as amended by St. 1894, c. 493, and St. 1895, cc. 286, 429, upon the application of his daughter, by the special justice of the police court of Chelsea. It is not denied that the commitment was in accordance with the provisions of the statutes, which apply alike to all the inhabitants of this Commonwealth. These statutes do not in terms require any notice to the person alleged to be insane, before the order of commitment is signed; and probably no such notice is required by construction, in view of the long usage to the contrary in this Commonwealth. But ample provision is made by later sections of the same chapter for his discharge afterwards by any two of the trustees of the hospital, or, upon judicial proceedings, by a justice of the Supreme Judicial Court, upon the written application of any person, if it appears that the person so confined is not insane, or that he is not dangerous to himself or others, and ought not longer to be so confined. Pub. Sts. c. 87, §§ 40–44.

The order of commitment settles nothing finally or conclusively against the person committed. It does not take from him the care or control of his property. It is not equivalent to the appointment of a guardian over him. *Leggate* v. *Clark*, 111 Mass. 308, 310. He is entitled as a matter of right to institute judicial proceedings under the statutes, to determine the necessity and propriety of his confinement. He is not denied the same

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protection of the laws which is enjoyed by all other persons in the Commonwealth under like circumstances. He is not, therefore, deprived of liberty without due process of law, according to the judicial construction which has been put upon those words. *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380. *Hallinger* v. *Davis*, 146 U. S. 314, 321. *Caldwell* v. *Texas*, 137 U. S. 692. *Dent* v. *West Virginia*, 129 U. S. 114. *Missouri* v. *Lewis*, 101 U. S. 22. It has been declared repeatedly that the phrase "due process of law" does not of itself require a trial by jury in States where the usage and statutes are otherwise. *Montana Co.* v. *St. Louis Mining & Milling Co.* 152 U. S. 160, 171. *Hurtado* v. *People*, 110 U. S. 516. *Walker* v. *Sauvinet*, 92 U. S. 90. The Legislature, as *parens patriæ*, may to some extent make provision for the care of those who are unable to take proper care of themselves, as in the case of insane persons and neglected children. *Sohier* v. *Massachusetts General Hospital*, 3 Cush. 483, 497. *Farnham* v. *Pierce*, 141 Mass. 203. *Church of Jesus Christ* v. *United States*, 136 U. S. 1, 57, 58. And the right to institute judicial proceedings under the statutes is a sufficient protection of the liberty of the subject to meet constitutional requirements. *Wares, petitioner*, 161 Mass. 70, 74. *Miller* v. *Horton*, 152 Mass. 540, 543. *Farnham* v. *Pierce*, 141 Mass. 203. *Jones* v. *Robbins*, 8 Gray, 329, 341. *Chavannes* v. *Priestley*, 80 Iowa, 316. *Doyle, petitioner*, 16 R. I. 537.

So far as the present case is affected, the Fourteenth Amendment adds nothing to what was required by Article 12 of the Declaration of Rights.

The order dismissing the petition was right.

Petition dismissed.

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HORACE H. BIGELOW *vs.* CITY COUNCIL OF WORCESTER. G. HENRY WHITCOMB & others *vs.* MAYOR OF WORCESTER & others.

Worcester. October 9, 1897. — November 8, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

City — Way — Specific Repairs — Order of City Council.

A mere change of grade in an existing way, or change in the material of which the way is constructed, is not an alteration of the way, within the meaning of Pub. Sts. c. 49, but "specific repairs" on the way; and an order authorizing the work, passed by a city council, which is given by statute exclusive jurisdiction to make such repairs within the limits of the city, is not open to objection, in the absence of a provision of statute or ordinance requiring any particular form of proceeding as preliminary to the adoption of such an order.

THE FIRST CASE is a petition for a writ of certiorari to quash an order of the respondent, as follows: "City of Worcester, in City Council, May 24, 1897. Ordered, That the Street Commissioner be, and he is hereby authorized and directed under the direction of the Mayor, and under the immediate direction of the City Engineer, to construct at the causeway crossing Lake Quinsigamond a three-arch masonry bridge, in accordance with plans on file in the office of the City Engineer. Estimated expense, $62,658.27. The cost of construction to be charged to street construction account." The second case is a bill in equity, under Pub. Sts. c. 27, § 129, to restrain the expenditure of money under the order. The cases were heard together before *Knowlton*, J., who, at the request of the parties, reserved them for the determination of the full court. The facts material to the point decided appear in the opinion.

W. A. Gile, for the petitioners.

A. P. Rugg, for the respondents.

KNOWLTON, J. These two cases are founded on the alleged illegality of action taken by the city council of the city of Worcester in adopting an order authorizing and directing the construction of a bridge at the causeway crossing Lake Quinsigamond, in accordance with plans on file in the office of the city

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engineer. The first is a petition for a writ of certiorari to quash the proceedings; the second is a bill in equity brought by ten tax-payers under Pub. Sts. c. 27, § 129, to obtain an injunction against the officers of the city to prevent the expenditure of money under the order. The principal difference between the cases is in the remedy sought.

According to the record now before us, the proposed work involves, first, a change of grade in an existing highway, and, secondly, a change in the material of which the way is constructed. There is now a causeway built across the lake by filling along the line of the highway, and constructing an embankment of earth over which the travel passes. The order directs an excavation of the earth, and the substitution of a bridge for a certain distance along the highway. The width of the location of the highway at this point, as laid out by the county commissioners, does not appear. Their order for construction required that the travelled part should be worked for use by teams to the width of twenty-four feet, and the agreed statement of facts shows that the width of the travelled way has been in fact about thirty-three feet. The lake at this point is about eighty feet deep, and the filling for the causeway sloping upward is about two hundred and thirty feet wide at the bottom. Lake Quinsigamond is a great pond, and it is agreed that the proposed location for the bridge, and the change of grade for the approaches to it, are entirely within the limits of the causeway as constructed, and outside of the limits of riparian ownership by any individual. The fair inference is that they are within the limits of the location of the highway; at least there is nothing to show that they are not. The proposed changes have been approved by the board of land and harbor commissioners, and by the Governor and Council, representing the interests of the public and of the Commonwealth in the great pond.

In *Callender* v. *Marsh*, 1 Pick. 478, it was held that, upon the location and construction of a highway and the payment of damages to abutters, the public acquire by purchase a right to do everything with the soil over which the passage goes that may render the way safe and convenient, including the making of changes of grade, however great, without the further payment

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of damages. Soon after this decision, a statute was passed, which now appears in Pub. Sts. c. 52, § 15, giving to abutters the damages caused by changes of grade, or other work done for the purpose of repairing a way. The right to make changes of grade and changes of construction by the public authorities within the limits of existing ways, without notice to abutters or other individuals who may deem themselves interested, is recognized by our statutes and decisions. If such changes are no greater than may be made as a part of ordinary repairs, looking only to such improvements as may be expected as incidental to reconstruction, they are within the authority of the highway surveyor or road commissioners. If they are of great magnitude, they are made under orders for specific repairs passed by the county commissioners, or by the selectmen or road commissioners of towns, or by the proper authorities in cities.

Provisions for laying out, altering, and discontinuing highways and town ways are found in Pub. Sts. c. 49. In § 13 of this statute there is a provision for locating anew highways and town ways by the county commissioners, and in §§ 10 and 65 there is authority for making specific repairs. When specific repairs are contemplated upon an existing way, the only parties whose interest is so far recognized by the statutes as to entitle them to notice, are the cities or towns which may be called upon to pay the expense of the work. The provisions of the statute requiring notice to landowners when a way is laid out or altered by the authorities of a town do not apply to the making of specific repairs. Pub. Sts. c. 49, §§ 65–67. A town way may be discontinued without notice to individuals, except by the warrant calling the town meeting. Pub. Sts. c. 49, § 66. *Avery* v. *Stewart*, 1 Cush. 496. So if the county commissioners, acting upon a petition for laying out or altering a highway, are of opinion that the existing highway can be so far amended as to supersede the necessity of laying out a new highway, or altering an existing highway, they may proceed to order specific repairs by giving notice to the towns interested, without notice to individuals that specific repairs are contemplated. Pub. Sts. c. 49, § 10. If individuals suffer damage from the making of specific repairs, either under an order by the county commissioners, or by the selectmen of towns, they may recover them. Pub. Sts. c. 49, §§ 15, 68.

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The distinction between a technical alteration of a highway or town way and an order for specific repairs upon an existing way is recognized in many sections of the chapter just cited. A mere change of grade in an existing way, or change in the material of which a way is constructed, is not an alteration of a way within the meaning of this chapter. A technical alteration is the substitution of one way for another. *Bliss* v. *Deerfield*, 13 Pick. 102, 106. *Goodwin* v. *Marblehead*, 1 Allen, 37. *Commonwealth* v. *Cambridge*, 7 Mass. 158, 163. The work to be done under the order before us is not a technical alteration of the highway, but specific repairs of the way.

By St. 1893, c. 444, § 20, the city council of the city of Worcester is given exclusive jurisdiction to lay out, alter, or discontinue, not only town ways, but highways within the limits of the city, and to make specific repairs upon such ways. *Worcester* v. *County Commissioners*, 167 Mass. 565. We have not been referred to any ordinances of the city of Worcester prescribing the course of proceedings in such cases. Looking to the statutes alone, there is nothing that requires any particular form of proceeding as preliminary to the adoption of an order for specific repairs upon a highway or town way within the city. The requirements of Pub. Sts. c. 49, § 10, that the county commissioners, before ordering specific repairs upon a highway, shall give due notice to the towns interested, is not applicable, because the city council cannot make an order for repairs upon any part of a highway outside of Worcester, and no town can be interested. The interest of the city is represented by the city council, which is the acting tribunal. In this particular, their authority to act in reference to highways within the city is as great as that of selectmen of towns acting under Pub. Sts. c. 49, § 65, in ordering specific repairs upon a town way, and we have already seen that in such cases no notice is required. It follows that no illegality or error is shown in the adoption of the order in question.

This view of the law and facts makes it unnecessary to consider other grounds of defence relied on by the respondents in each of the cases.

Petition dismissed, and bill dismissed.

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COMMONWEALTH *vs.* JOHN O'NEIL.

Franklin. September 28, 1897. — November 11, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Homicide — Evidence.

At the trial of an indictment for the murder of a woman, there was evidence that, within about two hours after the murder, the defendant had in his possession money consisting of a ten-dollar bill, a five-dollar bill, and fifty cents in silver; that within about one hour before the murder, and for some time previously, he had no money of any kind; that he gave false and contradictory accounts of the way in which he obtained the bills and silver; and that, while talking of the death of the woman to a prisoner in the jail, he admitted that he had ten dollars of her money. *Held*, that evidence that the deceased, on the day before the murder, received a check of a certain amount and from its proceeds paid bills and made purchases, leaving a balance in her possession consisting of a ten-dollar bill, a five-dollar bill, and some change, and that a search of her house by her sister two days after the murder disclosed only a few cents in money, was proper for the consideration of the jury in connection with the other evidence in the case.

INDICTMENT for the murder of Hattie E. McCloud, on January 8, 1897, at Buckland, by strangulation. At the trial in the Superior Court, before *Mason*, C. J., *Fessenden* and *Sheldon*, JJ., the jury returned a verdict of guilty; and the defendant alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

E. H. Beer, for the defendant.

J. C. Hammond, District Attorney, (*F. L. Greene* with him,) for the Commonwealth.

KNOWLTON, J. The bill of exceptions in this case does not purport to give the evidence in full, but only so much of it as bears upon the questions of law. No question in regard to the weight or sufficiency of evidence is presented, but only the question whether the testimony objected to was competent for the consideration of the jury in connection with the other circumstances of the case.

Among the circumstances relied on by the Commonwealth was the alleged possession by the defendant, immediately after the murder, of money which the deceased had in her possession when she was attacked. There was testimony tending to show

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that within about two hours after the murder the defendant had in his possession a ten-dollar bill, a five-dollar bill, and either two quarters of a dollar or a fifty-cent piece in silver.

The evidence tended to show that, at the time of his going to supper, a little more than an hour before the supposed time of the murder, and for some time previously, he had no money of any kind, and there was testimony that he gave false and contradictory accounts of the way in which he obtained the bills and silver which he had later in the evening.

There was also testimony that, while talking of the death of the murdered woman to a prisoner in the jail, he admitted that he had ten dollars of her money, and said that, if he had not been drunk, it would not have happened, although at the same time he denied choking her.

With this evidence for the consideration of the jury, and other circumstantial evidence tending to connect the prisoner with the crime, it was important for the Commonwealth, if it could, to introduce additional evidence that the money seen in his possession soon after the murder was taken from the deceased.

All the evidence objected to related to this subject. The objection was general that it was too remote. The testimony tended to show that the murder was committed at a little after seven o'clock in the evening of January 8. There was testimony that at about four o'clock in the afternoon of January 7, the father of the murdered woman gave her two checks, one of $40, and the other of $39.60; that soon afterward she went from her home about a mile, to the village of Shelburne Falls, and gave the check of $39.60 in payment of a bill of $16.53 which she owed, and received the balance in the form of a ten-dollar bill, two five-dollar bills, and smaller bills, the denominations of which did not appear. She made a payment of $4.18 at the village that afternoon, before she returned home, and some other payments on the next evening, for which she paid sums amounting in all, including a small payment for washing, to $3.06, making the aggregate of payments $7.24 from the $23.07 which she received from the proceeds of the check. There was testimony that she was accustomed to keep her money in a pocket-book, and her pocket-book in a shopping bag.

The two checks, and afterwards one of the checks and the

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money, were so kept on January 7 and January 8. The shopping bag and pocket-book, as well as several small articles which she had purchased, were found near her body when the murder was discovered, and in her pocket-book were the $40 check and eight cents in money, and in the bottom of the bag were eight cents more. The balance unaccounted for from the proceeds of the check was $15.67; $15 of that, when last seen in her possession, was in the form of a ten-dollar bill and a five-dollar bill. The amount seen in the defendant's possession soon after the murder was $15.50, consisting of a ten-dollar bill, a five-dollar bill, and fifty cents in silver.

The deceased lived with her daughter, nine years old, in a house about forty feet from the house of her father, and about a mile from the business part of the village of Shelburne Falls. There was no evidence that she was absent from her house between the time of the receipt of the checks in the afternoon of January 7 and the time of her death, except as she went to the village in the afternoon of January 7, and again at about five o'clock in the afternoon of January 8, and that she called at her father's house on the evening of January 7.

There was evidence that she was seen at her own house shortly before noon on January 8. When she went to the village on January 8, she left her daughter alone in the house. The daughter remained there alone until about half past six o'clock, except for a few minutes, when she went to the house of her grandfather, forty feet away.

From half past six until ten o'clock in the same evening, an adult sister of the deceased and a boy who had come there by appointment to receive a music lesson from the deceased, remained in the house. They then left the house and locked it up, and it remained locked and unoccupied until January 10, when it was thoroughly searched by a sister of the deceased, who was allowed to testify that she found in it no money except three or four cents. It did not appear that any one had entered the house in the mean time, except some member of the family of the father of the deceased.

The testimony objected to was that in regard to the financial transactions of the deceased on January 7, and in regard to the search of the house on January 10. The objections go to its

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weight rather than to its competency. By the plans and the testimony, and perhaps by a view, the jury became familiar with the neighborhood where the deceased resided, and they learned something of her habits and mode of life. That the possibility of her having expended money other than that shown was not absolutely excluded did not render the testimony incompetent. The details of her dealings and the circumstances of her life shown by the testimony might have satisfied the jury that the probability of such expenditure was exceedingly small. The possibility, if there was a possibility, that the contents of her pocket-book might have been stolen during the half hour that the bag and the other articles found near the body lay on the floor of the piazza of her father's house, or remained in the kitchen before the bag and pocket-book were examined, affects the weight of the evidence, but the jury might have considered it too small to be important.* The same may be said of the possibility that a burglar entered the house and stole her money after her death, and before the house was searched.

The bills were not identified by ear-marks, but they corresponded in denomination, and such a likeness is often proper to be considered in connection with other incriminating evidence. See *Commonwealth* v. *Sturtivant*, 117 Mass. 122; *Commonwealth* v. *Scott*, 123 Mass. 222; *Commonwealth* v. *Billings*, 167 Mass. 283; *Riggs* v. *State*, 104 Ind. 261.

In the present case the testimony was not only to be considered in connection with other circumstances tending to show the guilt of the prisoner, but also with the prisoner's admissions on this very point, that he had ten dollars of the money of the deceased.

The testimony objected to was proper for the consideration of the jury, in connection with the other evidence in the case.

Exceptions overruled.

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* It appeared in evidence that the body of the deceased was discovered by her father in some woods about seventy feet from the highway and about a quarter of a mile from her home; that soon after such discovery he gathered the bundles and hand-bag, which lay near the body, and, running to his house, threw them upon the floor of the piazza, where they remained without examination for about half an hour unguarded; and that they were afterwards removed without examination to the kitchen of the house.

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JEANNIE C. WALL *vs.* THOMAS C. PLATT & another, receivers.

Norfolk. November 16, 1896. — November 18, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Loss of Property by Fire from Locomotive Engine — Liability of Receivers — "Railroad Corporation" — Statute — Action — Damages.

The receivers of a railroad corporation, who are authorized to operate and manage the railroad, are liable to an action under Pub. Sts. c. 112, § 214, providing that "Every railroad corporation . . . shall be responsible in damages to a person . . . whose buildings or other property may be injured by fire communicated by its locomotive engines."

The measure of damages in an action under Pub. Sts. c. 112, § 214, for the loss of buildings and their contents by fire communicated by a locomotive engine, is not the market value in either case, but the real value of the buildings at the time of the fire, ascertained by taking into account the original cost and the cost of replacing them, and making such allowance as depreciation from use, age, and other like causes, and the condition in which they were, require; and the actual worth of the personal property to the owner, ascertained by considering the cost of the articles when new, the length of time they have been used, and their condition at the time of the fire.

TORT, under Pub. Sts. c. 112, § 214, against Thomas C. Platt and Marsden J. Perry, receivers of the New York and New England Railroad Company, to recover for the loss of the plaintiff's buildings and their contents, and other property in Norfolk, by fire communicated by a locomotive engine on May 16, 1894. At the trial in the Superior Court, before *Sheldon*, J., the jury returned a verdict for the plaintiff; and the judge reported the case for the determination of this court. The facts appear in the opinion.

F. A. Farnham, for the defendants.

R. M. Saltonstall, (*H. E. Ruggles* with him,) for the plaintiff.

MORTON, J. This is an action against the defendants as receivers of the New York and New England Railroad Company, to enforce an alleged liability arising under Pub. Sts. c. 112, § 214.

The defendants were appointed by the United States Circuit Court for the District of Massachusetts. It does not appear that

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leave to bring this action has been granted by that court. But there seems to be no doubt that the action can be brought without leave. We understand the defendants to concede that it can. See U. S. St. of March 3, 1887, § 3, 24 U. S. Sts. at Large, 552; U. S. St. of August 13, 1888, §§ 2, 3, 25 U. S. Sts. at Large, 433; *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593; *McNulta* v. *Lochridge*, 141 U. S. 327; High, Receivers, § 395 *b*; Beach, Receivers, § 659.

The decree appointing the defendants is not before us; but it is stated in the report that "said receivers under their appointment took possession of the property of the said railroad, and conducted and operated the same up to and including the date of the fire which is the subject matter of this action," and we infer that at the time of the fire the general control, operation, and management of the railroad were in their hands.

The statute under which the action is brought is as follows: "Every railroad corporation and street railway company shall be responsible in damages to a person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf."

The defendants contend that the statute does not apply to them as receivers, but that the corporation itself is liable; and this contention presents the first question which arises in the case. The argument briefly stated is, that, the liability being wholly statutory, only those parties should be held liable who are expressly mentioned in the statute, and that the statute should not be extended by construction so as to include parties not named in it.

The statute is a remedial one, and is intended to afford protection to those whose property is exposed to risk in consequence of the danger from fire which attends the operation of railroads. *Bassett* v. *Connecticut River Railroad*, 145 Mass. 129. *Daniels* v. *Hart*, 118 Mass. 543. *Ross* v. *Boston & Worcester Railroad*, 6 Allen, 87. *Lyman* v. *Boston & Worcester Railroad*, 4 Cush. 288. *Hart* v. *Western Railroad*, 13 Met. 99. Remedial statutes

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are to be construed liberally, and so as to advance the remedy and carry out the object in view in their enactment, and to that end the letter, if necessary, will be restrained or enlarged according as the reason and purpose of the statute require. Cases may come so obviously within the equity of a statute, or within the remedy which it was designed to afford, that it would be unreasonable to suppose that they were not intended by the Legislature to be embraced within it, though the literal sense of the language used may not include them. *Somerset* v. *Dighton*, 12 Mass. 383, 384. *Whitney* v. *Whitney*, 14 Mass. 88, 92. *Brown* v. *Pendergast*, 7 Allen, 427. *Winslow* v. *Kimball*, 25 Maine, 493. Sedg. Stat. & Const. Law, 308. Potter's Dwarris on Statutes, 231.

Though appointed by a court and acting as its officers, the receivers of a railroad corporation, who are authorized to operate and manage a railroad, stand, for the time being, in many important respects, in the place of the corporation itself. They have sole possession of the railroad and of the property belonging to the corporation. They run trains, carry passengers, transport freight, and conduct in the usual manner those active operations for which the railroad was intended and constructed. They act as common carriers by virtue of and under the franchise conferred on the corporation, and as such, so far as the public is concerned, are subject to the same duties and liabilities, in very many if not in all respects, to which the corporation is subject, and which are imposed on it by the exercise of the power conferred by the franchise. *Central Trust Co.* v. *New York City & Northern Railroad*, 110 N. Y. 250, 257. They receive the earnings, and apply them under the direction of the court to the expenses of operating the railroad, to the preservation of the property and franchise, to the payment of the debts, and to other purposes which immediately benefit the corporation, and are such as the corporation itself would apply them to. The property of the corporation is liable for their contracts in the business of operating and managing the railroad, and for their misfeasances and nonfeasances, and those of their servants and agents, as it would be for those of the corporation itself, and for those of the corporation's own managers or servants. *McNulta* v. *Lochridge*, 141 U. S. 327, 331, 332. *Texas & Pacific*

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Railway v. *Cox*, 145 U. S. 593, 607. *Nichols* v. *Smith*, 115 Mass. 332. *Paige* v. *Smith*, 99 Mass. 395. *Murphy* v. *Holbrook*, 20 Ohio St. 137. Generally speaking, though not always, (see *United States Trust Co.* v. *Wabash Western Railway*, 150 U. S. 287, 299 *et seq.*, and *Quincy, Missouri, & Pacific Railroad* v. *Humphreys*, 145 U. S. 82,) they take the property subject to the performance of the contracts entered into by the corporation, and subject to liens arising from contracts made by it. *Kneeland* v. *American Loan & Trust Co.* 136 U. S. 89, 97. *Williams* v. *Clark*, 140 Mass. 238.

They are not the servants or agents of the corporation, but for some purposes at least their possession may be said to be in a sense its possession, and they succeed for the time being, by virtue of their appointment and authority, to many of its most important powers, privileges, and obligations. The mischief for which the statute is designed to provide a remedy is as incident to the operation of the road in their hands as in those of the corporation. And we cannot think that, by the use of the words "railroad corporation," the Legislature intended to exclude them from liability under the statute in question, but that the words were used in a comprehensive sense sufficiently broad to include parties holding the relation to the corporation which receivers of a railroad corporation usually do.

Cases in this State tend, we think, to support this view. In *Daniels* v. *Hart*, *ubi supra*, it was held that the statute applied to mortgagees who were in possession of a railroad for the purpose of foreclosure, and who were operating it as such mortgagees. In *Davis* v. *Providence & Worcester Railroad*, 121 Mass. 134, it was held that a lessee in possession, and running trains managed by its own servants and operated by its own locomotives, was liable under the statute for damages caused by a fire communicated by one of the locomotives.

In other States where this or similar questions have arisen, there seems to have been a difference of opinion, but we think that the weight of authority is in favor of the conclusion to which we have come. *Farrell* v. *Union Trust Co.* 77 Mo. 475. *Mikkelson* v. *Truesdale*, 63 Minn. 137. *Rouse* v. *Redinger*, 1 Kans. App. 355. *Rouse* v. *Harry*, 55 Kans. 589. *Hornsby* v. *Eddy*, 56 Fed. Rep. 461. *Rouse* v. *Hornsby*, 67 Fed. Rep. 219. *Central*

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Trust Co. v. *Wabash, St. Louis, & Pacific Railway*, 26 Fed. Rep. 12. Beach, Receivers, § 383. See, *contra*, *Henderson* v. *Walker*, 55 Ga. 481; *Turner* v. *Cross*, 83 Tex. 218; *Texas & Pacific Railway* v. *Collins*, 84 Tex. 121.

In some cases in which the corporation was held liable, it was expressly provided by statute that it should be liable, notwithstanding the railroad was in the possession of receivers or others, or the statute gave a right of action against the corporation or any party using or occupying the railroad. *Louisville, New Albany, & Chicago Railroad* v. *Cauble*, 46 Ind. 277. *Ohio & Mississippi Railway* v. *Russell*, 115 Ill. 52. *Ohio & Mississippi Railway* v. *Fitch*, 20 Ind. 498. *McKinney* v. *Ohio & Mississippi Railway*, 22 Ind. 99.

Some of these cases seem to be relied on as authority for the statement in High on Receivers that the possession of the receivers constitutes no defence to an action against the corporation to enforce a statutory liability. High, Receivers, (1st ed.) § 397. It may be that in this State an action would lie against the corporation or the receivers. It is intimated, if not decided, in *Davis* v. *Providence & Worcester Railroad*, *ubi supra*, that an action would lie against the corporation owning the road, or the lessees. It is not necessary, however, to consider that question now.

We find nothing in other statutory provisions necessarily inconsistent with the result which we have reached. The definition of "railroad corporation" in Pub. Sts. c. 112, § 1, is qualified by the words in the same section, "unless such meaning would be repugnant to the context, or to the manifest intention of the General Court." We do not think that, because in some cases in other sections of the chapter receivers are named in connection with the words "railroad corporation," or because in such connection in some other sections trustees are named and receivers are not, that the argument for their exclusion can be pressed so far as to say that it necessarily follows that, in all other cases in the statute in which duties or liabilities are imposed upon or remedies given against railroad corporations as such, receivers are not to be included because they are not named. Such a construction would relieve receivers from the duties and liabilities contained in numerous statutory provisions

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relating to the operation of railroads, designed to protect the public and to promote the safety and welfare of passengers, and from the benefits of which the Legislature hardly could have intended to exclude the public in the case of railroads operated by receivers. Section 169 of Pub. Sts. c. 112 is penal, and c. 173 of St. 1895 well may have been enacted to remove any doubt as to its application to receivers and assignees, and their servants and agents.

The precise scope of the Acts of Congress referred to above does not seem to have been settled by the Supreme Court of the United States, and although it has been considered elsewhere, (see Beach, Receivers, § 659, for a collection of cases,) we do not deem it necessary, in view of the construction which we have given to our own statute, to pass upon the question whether they subject receivers to the same liability in all cases to which the corporation would be subject under the laws of the State where its property is situated.

The remaining questions relate to the measure of damages. The defendants contend that it is the market value. The plaintiff contends that the defendants' liability is that of an insurer. The damages consist, first, of buildings destroyed, or substantially destroyed, by the fire; secondly, of household furniture, personal effects, and other personal property contained in the buildings and burned up by the fire; and thirdly, of the injury to and destruction of fences, fruit and shade trees, and sprout and grass land. The case was referred to an auditor, who made two reports, the second being called a supplemental report and the first the report. No evidence was introduced at the trial in the Superior Court on the question of damages except that contained in the two reports of the auditor, "the parties agreeing that the amounts found by the auditor should be taken as findings of fact, subject, however, to the determination of the Supreme Judicial Court of any questions as to the proper measure of damage arising on the face either of the report or the supplemental report." The supplemental report states the amount of damages if the rule of market value is to be applied, and how it was arrived at in the case of the buildings. In the report the auditor states that, in estimating the value of the buildings, he has "taken into consideration the original cost, the depreciation consequent upon

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the use to which they had been put, the condition in which they were, and also the cost of replacing them by other buildings of the same character, with a proper allowance for the difference between new buildings and the condition of the buildings in question on the day of the fire," and on that basis he finds the damages to be $5,250. Their fair market value in connection with the land he finds to be $3,250. In determining the amount of damages sustained by the loss of the furniture and other personal property included in the second item, the auditor states that he has "taken into consideration the cost of the articles when new, the length of time they have been used, and the condition they were in at the time of the fire," and on this basis he estimates the damages at $3,187.69. Their market value he finds to be $2,273.31. The report states the facts on which these findings are made. In regard to the buildings, the report, after describing them generally, proceeds as follows: "I find that the buildings were more expensive in character than is customary in the neighborhood in which they were situated, and that at no time could they probably have been sold for a price approximating the original cost of constructing them or the cost of replacing them. The buildings were in reasonably good repair at the time of the fire, and there was little depreciation beyond what would inevitably result from the lapse of time." In regard to the articles included in the second item, the auditor, after stating that the defendant introduced evidence as bearing on the measure of damages to show that second hand household furniture, effects, and other personal property of the kind destroyed was at the time of the fire commonly used in Boston, but that he did not find they were commonly used in the town of Norfolk, continues as follows: "I also find that the price paid for second hand articles is very much less than the price paid for them when new, by reason of the fact that they are second hand, and without reference to whether they have depreciated by use or not; and I find that the difference between the price of household furniture and other personal property destroyed when new, and the price at which it could be sold as second hand articles, is very much greater than any difference in value occasioned by the use to which the articles had been put, or the condition in which they were at the time of the fire," and he adds that, "under the cir-

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cumstances," he has "not deemed that the plaintiff is limited to . . . the market value of the household furniture and other personal property as second hand articles."

The object of the statute, as already observed, is to protect those whose property has been injured or destroyed in the manner therein described. *Hart* v. *Western Railroad*, and *Ross* v. *Boston & Worcester Railroad*, *ubi supra*. For that purpose the statute makes the corporation in effect an insurer, and authorizes it to protect itself by insuring the property for which it may be held responsible along its route. *Rowell* v. *Boston & Maine Railroad*, 57 N. H. 132, 139. *Mathews* v. *St. Louis & San Francisco Railway*, 121 Mo. 298. It is immaterial whether due care is exercised by it to prevent the communication of fire from its locomotives. It is doubtful whether contributory negligence on the part of the owner of the property destroyed would be a defence, unless so gross as to amount to fraud. *Rowell* v. *Boston & Maine Railroad*, *ubi supra*. The liability is an absolute one, and we think that the rule of damages should correspond to the liability. It is well settled that the principle on which damages are assessed in insurance cases is that of indemnity for the loss actually sustained. *Washington Mills Emery Manuf. Co.* v. *Weymouth & Braintree Ins. Co.* 135 Mass. 503, 505, 506. *Brinley* v. *National Ins. Co.* 11 Met. 195. *Burgess* v. *Alliance Ins. Co.* 10 Allen, 221. *Brady* v. *Northwestern Ins. Co.* 11 Mich. 425. *Illinois Ins. Co.* v. *Andes Ins. Co.* 67 Ill. 362. *Foley* v. *Manufacturers & Builders' Ins. Co.* 152 N. Y. 131, 134.

No general rule can be laid down by which the amount of the indemnity can be arrived at infallibly in all cases. In cases where the subject of insurance consists of commodities which are bought and sold in the market in the ordinary course of trade or dealing, the market value, as in cases of trover, would seem to furnish the best measure of ascertaining what amount will indemnify the insured for his loss. *Beale* v. *Boston*, 166 Mass. 53. *Equitable Ins. Co.* v. *Quinn*, 11 L. C. Rep. 170. *Wehle* v. *Haviland*, 69 N. Y. 448. In such cases market value usually is equivalent to market price, and the sum received by the insured would enable him to replace the goods which he had lost, with others equal to them in every respect, and thus restore him to as good a position as he was in before the fire occurred. But market

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value does not in all cases afford a correct measure of indemnity, and is not therefore "a universal test." *Beale* v. *Boston*, *ubi supra*. In some cases there is no market value, properly speaking, and in others, if there is, it plainly would not of itself afford full indemnity. *Mather* v. *American Express Co.* 138 Mass. 55. *Green* v. *Boston & Lowell Railroad*, 128 Mass. 221. *Starkey* v. *Kelly*, 50 N. Y. 676.

Ordinarily, in determining the market value of buildings, they are valued either for the purpose of removal, or, as was the case here, in connection with the land on which they stand. The first manifestly would not afford just compensation in the present instance. In the second case, the value depends on the location and other considerations entering into the value of the land, and therefore would not necessarily constitute a just criterion of the loss actually sustained by the destruction of the buildings. Sutherland, Damages, § 821. Buildings adapted to the land on which they stand are not bought and sold in the market separate from the land.

We think that the manner in which the auditor arrived at the damages approaches more nearly the correct rule in cases like the present. We understand him to have assessed them according to the real value of the buildings at the time of the fire, and to have ascertained that, by taking into account the original cost, and the cost of replacing them, and making such allowance as depreciation from use, age, and other like causes, and the condition in which they were, required. We think that this was correct. See *Washington Mills Emery Manuf. Co* v. *Weymouth & Braintree Ins. Co.* 135 Mass. 503; *Ætna Ins. Co.* v. *Johnson*, 11 Bush, 587; *State Ins. Co.* v. *Taylor*, 14 Col. 499; *Jacksonville, Tampa, & Key West Railway* v. *Peninsular Land, Transportation, & Manuf. Co.* 27 Fla. 1, 136; *Laurent* v. *Chatham Ins. Co.* 1 Hall, (N. Y.) 41; *Washington Mills Emery Manuf. Co.* v. *Commercial Ins. Co.* 13 Fed. Rep. 646.

We also think that as to the furniture, personal effects, and other personal property, the market value, if there was one, would fail to furnish a satisfactory test of the actual loss. We assume that by "other personal property" is meant property of the same general description as the furniture and personal effects. It is true that the defendant offered testimony tending "to show that

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second hand household furniture, effects, and other personal property of the kind destroyed, were, at the time of the fire, commonly sold in Boston." But if we assume that Boston was the nearest place where such articles were bought and sold, and that the market value there would be evidence of the market value at the place of loss, we nevertheless think that a sum equal to the market value would not indemnify the plaintiff for the loss which she has sustained. Such a value would depend largely on considerations which would have nothing to do with the real value of the articles, or with their actual worth to the owner. And we think that, being in the plaintiff's possession and used and kept for use by her in her house and about her person, without any intention or expectation on her part of selling them or of offering them for sale, they should be regarded as belonging in a sense to the person of the owner, and that the damages should be assessed according to the actual worth of the articles to her for use in the condition in which they were at the time of the fire, excluding any fanciful or sentimental considerations. *Beale* v. *Boston*, *ubi supra*, and cases there cited. *International & Great Northern Railway* v. *Nicholson*, 61 Tex. 550, 553. *Atchison, Topeka, & Sante Fé Railroad* v. *Stanford*, 12 Kans. 354, 380. *Denver, South Park, & Pacific Railroad* v. *Frame*, 6 Col. 382, 385. *Sun Fire Office* v. *Ayerst*, 37 Neb. 184, 192, 193. *International & Great Northern Railway* v. *Searight*, 8 Tex. Civil App. 593. *Starkey* v. *Kelly*, 50 N. Y. 676. *Fairfax* v. *New York Central & Hudson River Railroad*, 73 N. Y. 167. Sedg. Damages, (8th ed.) § 251.

We know of no more satisfactory way of arriving at this than to do as the auditor has done, namely, take the cost of the articles when new, the length of time they have been used, the condition they were in at the time of the fire, and from these facts determine what they were then worth to the owner.

We do not understand that there is any dispute respecting the damages to which the plaintiff is entitled for the injury to and destruction of the grass and sprout land, fruit and shade trees, and fences.

The result is, that we think that the plaintiff is entitled to recover and that judgment should be entered for the sum found due by the auditor in his report, namely, $8,939.69, with interest.

So ordered.

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GEORGE S. MERRILL *vs.* OLD COLONY MUTUAL INSURANCE COMPANY.

Suffolk. September 7, 1897. — November 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Assessment upon Members of Mutual Fire Insurance Company — Statute.

On a petition by the receiver of a mutual fire insurance company, praying that an assessment upon the members might be revoked, and that the directors might be required to make a new one under St. 1894, c. 522, § 49, which authorizes this court to make such decrees as under the circumstances justice and equity may require, it appeared that the previous assessment was made in good faith; that no policy holder ever objected to its validity; that the company had issued many policies to non-residents; that nearly all the resident policy holders had paid their assessments before the appointment of the receiver, but only a few of the non-residents had so paid; that the receiver had collected a small sum on the assessments and believed that little more could be collected; that there had been no finding that the assessment was illegal, although the receiver doubted its validity; and that the new assessment, if ordered, would be designed to meet the same losses as the first assessment. *Held*, that justice and equity did not require a new assessment to be made.

PETITION IN EQUITY, by the receiver of the defendant insurance company, praying that an assessment heretofore made by the directors thereof be revoked, and that they be required to make another assessment under the provisions of St. 1894, c. 522, §§ 47, 48, as amended by St. 1897, c. 197, § 2. Hearing before *Morton*, J., who, in addition to the facts stated in the petition, which he found to be true, and the material portions of which appear in the opinion, found that all outstanding policies were cancelled on July 14, 1896, and that the receiver would not be able, after his appointment and before July 14, 1897, to make the necessary computations to lay an assessment, have his application referred to an auditor, and the auditor's report confirmed by the court. The judge reported the case to the full court; such decree to be entered, or other disposition made of the petition, as should seem meet.

W. B. French, receiver, *pro se*.

ALLEN, J. This is a petition by the receiver of a mutual fire insurance company, praying that an assessment heretofore made

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upon the members by the directors of the company may be revoked, and that the directors be required to make a new assessment under the provisions of St. 1894, c. 522, § 49, which authorize this court to make such orders and decrees in the premises as under all the circumstances justice and equity require. The assessment heretofore made was made in good faith, as we must assume in the absence of any suggestion to the contrary, and no policy holder, so far as appears, has ever objected to its validity. The company had issued many policies to non-residents of this Commonwealth. Nearly all of the resident policy holders paid their assessments before the appointment of the receiver, but only a few of the non-residents have so paid. The receiver himself has proceeded with the collection of the assessments, and has collected a small sum, and believes that little more can be collected. He also says that grave doubt exists whether the assessment was equitable and legally laid. The ground of doubt is not stated, and there has been no finding that the assessment was illegal. Certainly it was acted upon as valid by all parties concerned, until the receiver found that little more could be collected upon it. Under this state of things, the question arises whether justice and equity require a new assessment to be ordered.

It is open to doubt whether it is competent under the statute to lay a new assessment. The assessment heretofore made was ordered on May 11, 1896. All the policies were cancelled by vote of July 14, 1896, and this would prevent any liability for losses occurring after that date. It does not appear that there were any losses between those dates. The new assessment, therefore, if ordered, would be designed to meet the same losses as the first assessment. In *People's Ins. Co.* v. *Allen*, 10 Gray, 297, it was held that, where the original assessment was illegally laid, a new one might be ordered, although a small number of policy holders had paid the original assessment, credit being given for the amounts so paid. In the present case, the original assessment must be taken to have been legal, and it has been paid by nearly all of the resident policy holders, and it would seem that little or nothing can be collected of others.

Without absolutely deciding that it is not competent to lay a

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new assessment, justice and equity do not require it to be done under the existing circumstances. Nothing is shown to call for a new assessment, except the non-collection of a large portion of the old one. The effect of a new assessment, if valid, would be to impose on resident policy holders a disproportionate burden, and in effect to make them pay for non-residents. It does not appear where the losses occurred which it is now sought to raise the money to pay. A proportionate share of them may have been out of the State. However that may be, it appears in effect that only resident policy holders can be relied on to pay an assessment, and nearly all of these have already paid sums which were assessed in good faith as sufficient for the purpose, and which probably are their full proportionate share of the losses incurred. Under these circumstances, no new assessment should be laid upon them. *Petition dismissed.*

HELEN E. BUMSTEAD *vs.* FRANCIS M. COOK.

Hampshire. September 21, 1897. — November 22, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Deed — Implied Grant of Easement — Action — Sewer — Statute — Lien.

If A., by a warranty deed, buys land in a city of B., who has previously connected the house on the land with a public sewer unlawfully, no right so to use the sewer as appurtenant to the land passes by implication, and if A. is compelled to pay to the city a fee for entering the sewer, he cannot recover the amount of B.; nor did the city, under St. 1888, c. 354, have a lien upon the granted premises, at the time of the conveyance, for the entrance fee to the sewer, which constituted an encumbrance on the property.

CONTRACT, in three counts, to recover fifty dollars. The first count was for breach of the covenant against encumbrances in a warranty deed of land in Northampton, the breach being an alleged lien of the city on the granted premises for the amount of an entrance fee to a sewer. The second count was for money had and received; and the third count was for money paid. The case was submitted to the Superior Court, and, after judgment

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for the defendant, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

W. G. Bassett, for the plaintiff.

T. G. Spaulding, for the defendant.

KNOWLTON, J. The plaintiff's claim is founded solely on the contract expressed in writing in the defendant's deed. Previously to the erection of the house standing on the lot conveyed by the defendant to the plaintiff, one Maynard, owning a lot adjoining the one described in the deed, and acting under an oral license from the defendant, constructed a drain from a house which he built on his lot, through the land described in the deed to a brook, and thus conducted the sewage from his house across the defendant's lot. Afterwards the city laid a public sewer through the street in front of the premises, and Maynard took the end of his drain out of the brook and entered it into the sewer, and paid the city the regular fee for entrance for a single house, in accordance with the regulations of the sewer commissioners. Subsequently the defendant erected a double tenement house on the land described in his deed to the plaintiff, and without permission from the city or from Maynard entered the drain from this house into Maynard's drain on his own land, and in that way drained his house into the public sewer. He was using the public sewer in this way surreptitiously, or at least without right, at the time of making the deed to the plaintiff, who was afterwards compelled to pay to the city a fee of fifty dollars for entering the sewer, which she seeks to recover in this action.

The deed describes the land by metes and bounds, and makes no reference to any right in other land, or to the subject of drainage in any way. The public sewer was outside of the land conveyed, and it is obvious that no right to use it passed as parcel of the real estate described.

The plaintiff contends that a right to use the sewer was appurtenant to the land conveyed, and therefore passed by implication. We need not consider whether such a right was so far necessary to the use and enjoyment of the property conveyed that an easement would have been created by implication as against the grantor if he had been the owner of the public sewer and the land through which it runs, for there is another

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answer to this part of the plaintiff's case. The defendant was not the owner of the sewer, nor of the land through which it runs, and he had no right in it which he could convey. In *Philbrick* v. *Ewing*, 97 Mass. 133, Mr. Justice Hoar says that "an easement, where it is not expressly described in the conveyance, must actually belong to the estate conveyed in order to pass by implication." This was the precise point adjudicated. To the same effect are *Swanzey* v. *Brooks*, 34 Vt. 451, and *Spaulding* v. *Abbott*, 55 N. H. 423. No case to the contrary has been brought to our attention. See also in recognition and further application of the doctrine, *Wells* v. *Day*, 124 Mass. 38, 43, and *Johnson* v. *Knapp*, 146 Mass. 70, 75. We think it clear that the deed did not convey by implication, nor purport to convey, any right to drain the premises through the public sewer beyond the limits of the plaintiff's land without payment for the privilege.

The only remaining question is whether the city, by virtue of St. 1888, c. 354, and its action under it, had a lien upon the granted premises at the time of the conveyance which constituted an encumbrance upon the property. This statute, by §§ 5 and 7, provides two ways in which the city may be reimbursed in whole or in part for the expense of constructing a sewer: one is by assessment of the cost upon the estates of persons benefited; the other is by prescribing a sum to be paid as a condition of allowing a particular drain to be connected with the sewer. Assessments made under § 5 constitute a lien upon the estates for two years from the time of the assessment, but the statute gives no lien for a fee to be paid under § 7 as one of the terms and conditions of entering a sewer with a particular drain. The agreed facts show that the cost of construction of this sewer was paid with money appropriated by the city for that purpose, and that no assessment has ever been made upon any person benefited. On the other hand, the regulations of the sewer commissioners, acted upon by the city, prescribed, as one of the terms and conditions of entering a sewer with a particular drain, the payment of a fee. We do not intimate that, in the absence of a special provision therefor, the sewer commissioners could, by prescribing terms and conditions to that effect, create a valid lien upon an estate for the payment

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of such a fee. If they could do this, their rules and regulations show that they have not attempted to do it, and that there is no lien for payment under the existing law and under their rules and regulations.

It is obvious that the city proceeded in the construction and management of the sewer with a view to obtaining partial reimbursement from fees for entering the sewer, and not from assessments. It would now be impracticable, if not impossible, to lay assessments upon the estates benefited, and the agreed facts indicate that the city has had no intention of trying to do it. If the plaintiff relied upon the existence of a lien, the burden was upon her to show it. The defendant was unlawfully using the sewer at the time of making his deed, and the agreed facts fail to show that there were any relations between him and the city that subjected his estate to a lien. The plaintiff was mistaken in supposing that the defendant was the owner of a valuable right affecting the property outside of that described in the deed, about which nothing was said orally, and no stipulation was made in writing. There was no error in the decision of the Superior Court. *Judgment affirmed.*

ELLEN DEAN *vs.* DENNIS MURPHY.

Hampden. September 28, 1897. — November 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Evidence.

In an action for personal injuries occasioned to the plaintiff, who was a tenant of the defendant, by falling on a step of a staircase attached to the house, another tenant, having been allowed to state that the steps were loose at the time, cannot be allowed to testify that he had fallen on the same step in the same manner before the accident to the plaintiff, and that the condition of the step when he so fell was the same as when the plaintiff was hurt.

In an action for personal injuries occasioned to the plaintiff, who was a tenant of the defendant, by falling after dark on the step of a staircase which was outside the house and separated from the hall by the rear door, it not being the duty of the owner to light the hallway and there being evidence that the plain-

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tiff was in the exercise of due care, another tenant cannot be asked, referring to the time of the accident, "Was there any light in the hallway?" notwithstanding the statement of the plaintiff's attorney that the question was asked as bearing on the plaintiff's due care.

TORT, for personal injuries occasioned to the plaintiff on November 10, 1894, by reason of a defect in a set of wooden steps or stairs attached to a tenement house owned by the defendant, of whom the plaintiff was a tenant. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

The case was argued at the bar in September, 1897, and afterwards was submitted on briefs to all the justices.

N. P. Avery, for the plaintiff.

W. H. McClintock, (*J. B. Carroll* with him,) for the defendant.

BARKER, J. We do not understand from the bill of exceptions that the court excluded any direct testimony that the steps were defective before or at the time when the plaintiff met with her accident. She testified that the step was loose. Her son testified that the steps were all right when she moved into the tenement, and that he knew that they were loose just before she was hurt, and that he noticed they were loose about two months before she was hurt. Mrs. Wilson, the witness who was not allowed to answer the question whether or not she had fallen on the same step in the same manner before the accident to the plaintiff, was allowed to testify that the steps were loose. We therefore regard the question whether she had herself fallen on the step, and the offer to show that the condition of the steps when she fell was the same as when the plaintiff was hurt, as an attempt to show merely that a like accident had previously happened upon the steps to another person than the plaintiff. The happening of such an accident being immaterial, and the witness having been allowed to testify to the condition of the steps, which was material, we think that evidence that she had met with a like accident was properly excluded. The presiding justice might well consider the question and the offer as tending to draw the attention of the jury from the material question as to the condition of the steps, and to prejudice the defendant by compelling him to disprove or to explain an accident of which

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he was not shown to have had any previous information, and which as an accident was not material to the question at issue. The remaining exception is to the exclusion of the question, asked of the same Mrs. Wilson, "Was there any light in the hallway?" We assume that the question related to the time of the plaintiff's accident, although it is not so stated. This being after seven o'clock on a November evening, common knowledge shows that it was after dark, and no evidence that there was artificial light out of doors in the vicinity is stated. The steps on which the plaintiff fell were not in the hallway, but outside the house, and separated from the hall by the entrance door. It was not the duty of the owner to light the hallway, and the question as put, with the negative answer which was evidently expected, might well lead to the unfair inference that the absence of a light in the hall was a fault of the defendant, whose duty, as stated by counsel in offering the evidence, was to look after the hallway. Without giving the evidence in detail, the bill of exceptions states that there was evidence tending to show that the plaintiff was in the exercise of due care, and we infer that the real contention was whether the plaintiff fell because of a defective step, or from some other reason consistent with her own due care, but for which the defendant could not be held responsible. Notwithstanding the statement of the plaintiff's attorney, that the question was asked as bearing on the plaintiff's due care, a majority of the court think that, under all the circumstances, the presiding justice was justified in excluding it as tending to raise a false issue, and to lay the ground for an unjustifiable claim that the defendant was at fault in not lighting the hallway.

Exceptions overruled.

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JOHN THOMPSON *vs.* NORMAN PAPER COMPANY.

Hampden. September 29, 1897. — November 22, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Negligence — Assumption of Risk — Action.

At the trial of an action under the employers' liability act, St. 1887, c. 270, for personal injuries alleged to have been caused by the negligence of the defendant's superintendent, it appeared that the plaintiff was ordered by the superintendent to help work in a kind of vat used for mixing the pulp in the defendant's paper mill; that as he was stepping from a beam to a ladder in getting over the edge of the vat he slipped and fell; that the beam and inside of the vat were wet, and were made more slippery by soda ash used instead of soap for cleaning; that the plaintiff was an experienced man and knew that soda ash was in common use in the mill, but according to his testimony did not know that it had been used in the vat; and that the only negligence alleged was the failure to warn the plaintiff that soda ash had been used. *Held*, that there was no negligence on the part of the defendant.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

W. S. Robinson & J. B. Carroll, for the defendant.

W. Hamilton, for the plaintiff.

HOLMES, J. This is an action under St. 1887, c. 270, § 1, cl. 2, brought to recover for personal injuries alleged to have been caused by the negligence of the defendant's superintendent. The plaintiff was ordered by the superintendent to help to work in what is known as a stuff chest, a kind of vat used for mixing the pulp in a paper mill. He got over the edge of the vat, and as he was stepping from a beam to a ladder he slipped and fell. The beam and inside of the vat were wet, and were made more slippery by soda ash, which was used instead of soap for cleaning purposes. The plaintiff was an experienced man, and knew that soda ash was in common use in the mill, but according to his testimony did not know that it had been used in the stuff chest. The only negligence alleged is the failure to warn the plaintiff that soda ash had been used.

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We are of opinion that the case should have been taken from the jury. There are many transitory risks of which it is impracticable to require an employer to give notice to his men, although no doubt, if the risk is very great and unusual, the fact that it is short lived is not always an excuse. *Kanz* v. *Page*, 168 Mass. 217. *Whittaker* v. *Bent*, 167 Mass. 588. See *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71. The fact that the place was wet was obvious, if that be material, for the plaintiff testified that it was light enough for all practical purposes. It was to be expected that it would be wet, from the nature of the uses to which it was put. The fact that it was wet with soap and water, instead of water, merely enhanced the obvious need of care. *McCauley* v. *Springfield Street Railway*, *ante*, 301. The plaintiff was not invited to use the beam, but, so far as appears, might have got upon the ladder at once. If the plaintiff had been engaged upon this work in the regular routine of his duty, plainly it would have been unreasonable to require his employers to have some one at hand to notify him that the beam was wet and that soda ash had been used. If the facts that he started by special order and that the superintendent was at hand affect the extent of the defendant's duty, the superintendent was warranted in assuming that the plaintiff would use his eyes, and in supposing that he would know that soda ash might have been employed.

Exceptions sustained.

JOSEPHINE BURNETT & others, trustees, *vs.* COMMONWEALTH & others.

Worcester. October 8, 1897. — November 22, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Metropolitan Water Act — Equity Practice — Taking of Right to fill Land — Sufficiency of Description of Land — Constitutionality of Statute — Sea Level — Boston Water Board Datum — "Rights" — Easement — Validity of Taking.

If an exception to the sufficiency of an answer in a suit in equity is overruled, and no appeal from the order is taken, upon an appeal to this court from the final

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decree such exception will be considered only so far as it appears that the final decree is affected by the order overruling it.

The St. 1895, c. 488, entitled "An Act to provide for a Metropolitan Water Supply," is not in violation of the Constitution of the United States, or of this Commonwealth.

So far as this court has any judicial knowledge on the subject, the level of the sea at mean low water in Boston Harbor is a certain and stable level for determining grades or heights in the vicinity of Boston.

The "rights" which St. 1895, c. 488, in the last clause of § 4, authorizes the Metropolitan Water Board to take, in carrying out the powers and duties conferred by the statute, are rights in land.

Section 4 of St. 1895, c. 488, after enumerating the waters, water rights, lands, and other property which the Metropolitan Water Board may take by purchase or otherwise, "any or all of the aforesaid lands to be taken in fee or otherwise, as said board may determine," concludes as follows: "Said board may take any other lands in fee, easements, rights, and other property that said board may deem necessary or desirable for carrying out the powers and duties conferred upon them by this act." *Held*, that the board was empowered, when it did not deem it necessary to take lands other than those before described in fee, to take such new easements or rights in other lands as it deemed necessary or desirable for carrying out its powers and duties.

The right taken by the Metropolitan Water Board to fill to a specified grade and perpetually to maintain the filling of certain lands, reserving to the owners thereof the right to dig and maintain below such grade necessary cellars, and to lay and maintain necessary pipes for gas, water, or drainage, in such a manner as not to affect injuriously the water in a reservoir, is a right in land which may be taken under St. 1895, c. 488, § 4.

BILL IN EQUITY, filed May 24, 1897, in the Superior Court, by the trustees under the will of Joseph Burnett, against the Commonwealth, and Henry H. Sprague, Wilmot R. Evans, and Henry P. Walcott, the commissioners constituting the Metropolitan Water Board, appointed under St. 1895, c. 488, to restrain the doing of certain acts on the plaintiffs' land in Southborough. Hearing before *Dunbar*, J., who dismissed the bill, with costs; and the plaintiffs appealed to this court. The facts appear in the opinion.

F. P. Goulding & C. F. Choate, Jr., (*W. S. B. Hopkins* with them,) for the plaintiffs.

J. M. Hallowell, Assistant Attorney General, for the Commonwealth.

FIELD, C. J. This is a bill in equity, brought in the Superior Court by the trustees under the will of Joseph Burnett, against the Commonwealth and the commissioners constituting the Metropolitan Water Board, appointed under St. 1895, c. 488. The cause, it is conceded, was heard in the Superior Court upon the

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bill, and upon what is called the further answer of the defendants, and upon a stipulation signed by counsel in the nature of an agreed statement of some of the facts. A decree was entered in that court, dismissing the bill, with costs, and the plaintiffs appealed. It appears that the plaintiffs excepted to the "further answer" which was filed, and for ground of exception alleged "that said answer renders it wholly uncertain whether the defendants rely upon the taking filed by them on the fourth day of January, 1896, or upon the taking filed by them on the sixth day of July, 1897, if upon either, and that the rights described in said taking, severally, are entirely different and inconsistent with each other; and further, that it is not made to appear whether the said taking of January 4, 1896, covers the same area of land as that of July 6, 1897; and it does not appear by said answer whether the defendants claim the right to enter upon the whole of the plaintiffs' premises, as described in their bill of complaint, or otherwise." This exception to the sufficiency of the answer was overruled on July 28, 1897, and on July 31 the bill was dismissed. It does not appear that the plaintiffs appealed from the interlocutory order overruling the exception to the answer. Both parties, in their briefs, have argued the case as if the plaintiffs had appealed from this interlocutory order. The practice is to appeal from an interlocutory order if the party aggrieved desires to take the questions of law involved in it to the full court. "Interlocutory decrees not appealed from shall be open to revision on appeals from final decrees so far only as it appears to the full court that such final decrees are erroneously affected thereby." Pub. Sts. c. 151, § 17. As the plaintiffs set down the cause for hearing upon the bill and further answer, and the stipulation of counsel, it is doubtful if this exception ought to be considered. Exceptions to answers for insufficiency are of less importance now than formerly, since answers to bills for relief are not sworn to and cannot be used as evidence; still the chancery rules of this court and of the Superior Court permit such exceptions. In the present case, we shall consider the exception only so far as it appears that the final decree was affected by the order overruling the exception.

The answer admits the taking of January 4, 1896, as alleged

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in the bill, and a copy of the taking is annexed to the stipulation of the parties. The answer sets up a taking dated July 3, 1897, and recorded on July 6, 1897, a copy of which is annexed to the stipulation. This last taking was subsequent to the filing of the bill, which was on May 24, 1897, and the taking describes the three parcels of land in which the right to fill is taken specifically by metes and bounds; and the answer alleges that these three parcels are a part of the two parcels of land described in the first paragraph of the bill as belonging to the plaintiffs. On a hearing upon the bill and answer this allegation must be taken to be true. The papers before us do not enable us to determine whether the taking of January 4, 1896, of the right to fill certain lands "now or formerly of Joseph Burnett, adjoining the lands described in the clauses 69 and 70 of said taking by the city of Boston, recorded in said registry April 30, 1894," contains a sufficiently definite description of the lands in which the right to fill is taken, or whether the taking is void for uncertainty in the description. St. 1895, c. 488, § 5, requires a description in the statement of the taking "as certain as is required in a common conveyance of land." It does not appear when Joseph Burnett died, or what parcels of land adjoining the lands described in the clauses 69 and 70 of the taking by the city of Boston he owned at the time of the taking by the Metropolitan Water Board, or had previously owned, or whether he had ever owned any parcels. It is possible that this description might be made sufficiently certain by evidence, but no evidence is before us. The second taking on its face appears to be specific enough in its description of the three parcels of the plaintiffs' land in which the right to fill is taken.

The bill alleges as follows: "Fourth. The said respondents, by their agents and servants in the construction of their works in and upon the lands above described, as taken from said city of Boston, intend and are about to enter without right upon the adjoining land of your petitioners outside said taking, and are proceeding and about to proceed to trample down the same with men and horses and teams, and to dig thereon and to pile great quantities of earth thereon, and to destroy the vegetation, and to cut the timber standing upon the same, and are now threat-

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ening to do irreparable injury thereto." This allegation the defendants admit in their answer, but from the papers in the case it does not appear that the defendants intend to enter upon any land of the plaintiffs which is outside the boundaries of the land the right to fill which was taken by the taking of July 6, 1897. The plaintiffs complain that it does not appear, from the answer on which the case was heard, whether the defendants "claim the right to enter upon the whole of the plaintiffs' premises as described in their bill of complaint, or otherwise," or "whether the said taking of January 4, 1896, covers the same area of land as that of July 6, 1897." But as it does not affirmatively appear from the papers in the case that the defendants intend to enter upon any land, for the purpose of filling it, which is not definitely described in the taking of July 6, 1897, if this is the fact, the plaintiffs should have averred it by an amendment to the bill made after the filing of the further answer, and before setting down the cause for hearing on bill and answer.

Apart from the description of the lands in which the right to fill is taken by the taking of January 4, 1896, and that of July 6, 1897, there are differences in the other rights which purport to have been taken by the two takings. The first taking is of the right to fill the lands "to grade two hundred and fifty-one (251) above the datum known as Boston Water Board Datum, with material excavated from other lands, and to fill above and upon said material to grade two hundred and fifty-two (252) above said datum with loam, and to cut down and remove all trees and other growth thereon, including in this taking all rights and easements of the city of Boston in said adjoining lands; all said trees and other growth to be removed and all such filling to be completed within two years after the date of this taking." The second taking is of "the right at any time within two years from the date of this taking to fill said lands to grade two hundred and fifty-one (251) above the datum known as the Boston Water Board Datum, with material excavated from other lands of said Commonwealth, and at any time within said period to fill above and upon said material to grade two hundred and fifty-two (252) above said datum with loam, and perpetually to maintain said filling; reserving, however, to the respective owners of said premises, and their respective heirs

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and assigns, the right to dig and maintain below said grade whatever cellars may be necessary or reasonable in the construction of buildings thereon, and to lay and maintain such pipes as may be necessary or reasonable in the construction of buildings thereon, and to lay and maintain such pipes as may be necessary for the gas or water supply, or drainage of said lands and lands adjoining; provided, however, that such cellars shall not be maintained and such pipes or drainage shall not be laid or used in any way so as to affect injuriously the water in said reservoir; also the right at any time within two years from the date of this taking to cut down and remove all trees and other growth thereon."

We do not consider it important to consider these differences in the present case. If the first taking is void because the lands of the plaintiffs are insufficiently described, or for any other reason, or if it has been abandoned, it becomes immaterial. If both takings are to stand as valid, it is not necessary to determine in the present case in what manner they can be reconciled with each other. It is sufficient that it does not appear that the defendants intend to enter upon any land of the petitioners, except the parcels described in the second taking, or that they intend to enter upon these parcels except for filling them in accordance with the right to fill, and subject to the reservations expressly declared in this taking. If the second taking is valid, it will justify any of the things which, so far as now appears, the defendants intend to do upon the land of the plaintiffs.

The objections urged in argument by the plaintiffs to the legal validity of this second taking are, first, that St. 1895, c. 488, under which the taking was made, is in violation of the Constitution of the United States, and particularly of the Fourteenth Amendment, because the statute denies to the plaintiffs "the equal protection of the laws"; secondly, that the statute does not authorize the commissioners to take such rights in land as are described in the taking; and, thirdly, that the height to which the land is to be filled is not defined in the taking with the requisite certainty.

The objection that the statute is in violation of the Fourteenth Amendment of the Constitution of the United States rests upon the different provisions of the statute for determin-

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ing the damages suffered by persons whose property is taken or injured. There is in § 13 of the statute a provision for ascertaining the damages generally for the taking of any land, water, easements, or other property to which the plaintiffs as owners of the land described in the bill are subject in common with others. The method provided is by a petition to the Superior Court for a jury, who are to determine the damages in the same manner as damages for lands taken for highways are determined. There is a different provision in § 14, of which the owners of certain real estate can avail themselves if it is taken for the proposed reservoir upon Nashua River, or if it is entered upon, used, or injured by the taking of the waters of the Nashua River, or if the real estate is not taken, but is directly or indirectly decreased in value by the doings of the board under the act, and is situated in certain towns or parts of towns described in the section. This remedy is by an application to the Supreme Judicial Court for the appointment of a commission of three disinterested persons to determine the damages, if the parties cannot agree upon them. There is in this section also a provision that, if the owner of such real estate, or, if there is a mill thereon, of such real estate and the machinery therein, no part of which is taken, but which are decreased in value by the doings of the water board under the statute, signifies his willingness to surrender the real estate, or the real estate and machinery, the commission may determine the value of such real estate and machinery, and interest may be included in such value "at such rate and for such time as the commission may deem just and equitable." There is the further provision in this section, that any individual or firm owning on the 1st day of April, 1895, an established business on land in the town of West Boylston, whether the same is or is not taken under the act, if such individual or firm deem that such business is decreased in value by the carrying out of the provisions of the statute, whether by loss of custom or otherwise, may, if the parties cannot agree, have their damages determined and paid in the manner before provided in the section. By § 15 of the statute, it is provided that if the water board, or any person whose property is taken under the right of eminent domain, or entered upon or injured by the taking of said water, is dissatisfied with the award of the commission, they

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or he may claim a trial by jury, and that the board, if it so prefers, and the petitioner offers to make surrender, may pay the surrender value of property as determined under § 14, and receive a deed of the premises instead of paying the damages.

If it appeared that the differences in the mode of estimating the damages provided by the statute were purely arbitrary, it would deserve consideration whether the plaintiffs could not rightfully complain, that, although adequate provisions had been made for ascertaining and paying their damages, more favorable provisions had been made for other persons. We could not say that an application to the Supreme Judicial Court for the appointment of a commission to determine the damages, with the further right to claim a trial by jury, would be a procedure more favorable to the landowner than the ordinary application for a jury to the Superior Court to determine the damages, if the rules of law for estimating the damages were the same in both cases. But § 14 of the statute undoubtedly provides that, in certain cases falling within it, damages may be recovered for real estate not taken, but which directly or indirectly is decreased in value by the doings of the water board, or for a surrender of certain lands, no part of which has been taken, and the recovery of the full value thereof, or for damages for the loss of custom to an established business, and we assume that similar damages cannot be recovered under § 13.

The powers given by the statute to the water board are intended to be ample, to enable them to construct, maintain, and operate a system of water works for the Metropolitan Water District, as defined in § 3, and for that purpose the statute authorizes the board to take, in the name of the Commonwealth, ponds, works, lands, waters, easements, rights, and other property. The general plans and recommendations contained in the report of the State Board of Health to the Legislature of the year 1895 are referred to as a guide. A reference to that report shows that it was contemplated to take, in some instances, parts of villages which would be submerged by the reservoirs to be constructed, and as the indirect or consequential damages suffered by landowners from the takings in different localities might be very different in kind or amount, the Legislature may have been of opinion that the different conditions exist-

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ing in the different localities reasonably required different rules for estimating the damages. If the statute secures to the plaintiffs the payment of reasonable compensation for the taking of their property, according to the requirements of our Constitution, and if the provisions are the same for all persons whose lands in the same locality are taken for the same use, the statute cannot be deemed to be in violation either of the Constitution of Massachusetts or of that of the United States, because more favorable provisions for compensation have been made for persons whose lands and property are taken or injured in other localities where the damages are or reasonably may have been thought by the Legislature to be other or greater than those suffered by the plaintiffs, from the character of the occupation or of the business which in the other localities would be destroyed or injured. The different statutes which from time to time have been passed in Massachusetts for taking property for various public uses have contained many different provisions for ascertaining the damages, and the rule of damages applied by the courts has been determined in some respects by the particular language of each statute; but the provisions always have been sustained if they were found to satisfy the requirements of the Constitution. See *Rand* v. *Boston*, 164 Mass. 354; *Lincoln* v. *Commonwealth*, 164 Mass. 368. If the different provisions of St. 1895, c. 488, for ascertaining the damages of persons whose property is taken or injured, had been enacted at different times in separate statutes, it probably would not have occurred to any one to question the constitutionality of the provisions contained in any of the statutes. It is perhaps because different provisions are contained in the same statute that this objection has been urged, but, in the absence of all evidence to the contrary, it must be presumed that some reasons existed why the Legislature made the discrimination in the modes and rules for estimating the damages. We are of opinion that the statute is not in violation of the Constitution of the United States, or of this Commonwealth.

It is also argued that the datum known as the Boston Water Board Datum, which is the level of the sea at mean low water in Boston Harbor, is not a sufficiently definite level from which the grade of the filling should be measured. The case contains

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no evidence upon this point, and we are asked judicially to take notice, that the level of the sea at mean low water in Boston Harbor is not a fixed or definite level from which to measure grades at a place within thirty miles of Boston. So far as we have any judicial knowledge on the subject we are of opinion that the level of the sea at mean low water in Boston Harbor is as certain and stable a level as can be scientifically employed in determining grades or heights in the vicinity of Boston. Certainly we cannot assume, in the absence of evidence, that the Boston Water Board have adopted in practice a datum for levels which is not reasonably certain.

The last question is, whether the right to fill and perpetually maintain the filling of the parcels of the plaintiffs' land, in the manner and subject to the reservations described in the taking of July 6, 1897, is a right which the Metropolitan Water Board is authorized to take by the statute of 1895, without taking the parcels of land in fee in which the right is to be exercised. The language of the statute specially relied on by both plaintiffs and defendants is the last clause of § 4. That section, after enumerating the waters, water rights, real estate, ponds, basins, reservoirs, filter beds, dams, aqueducts, conduits, pumping stations, pipes, pumps, and other property which the Metropolitan Water Board may take by purchase or otherwise, "any or all of the aforesaid lands to be taken in fee or otherwise, as said board may determine," concludes as follows: "Said board may take any other lands in fee, easements, rights, and other property, that said board may deem necessary or desirable for carrying out the powers and duties conferred upon them by this act." The parcels of land in which the right to fill has been taken are in the town of Southborough, and they adjoin certain lands described in clauses 69 and 70 of a taking by the city of Boston. This taking by the city of Boston, as the bill alleges, was made by that city through its water board, on April 30, 1894, and the lands taken, being thus held by that city, were taken by the defendants on January 4, 1896, in pursuance of § 4 of the St. of 1895. The bill alleges, and the answer admits, that the city of Boston had not, and never had, any rights or easements in the lands of the plaintiffs adjoining the lands so taken by the city. We infer that the lands taken by the city were taken in pur-

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suance of St. 1894, c. 108. That statute authorizes the taking of "lands, rights in land, waters, and water rights." The last clause of § 4 of the St. of 1895 must mean by "rights," we think, rights in land, so that it must be interpreted as if it read "said board may take any other lands in fee, easements, rights in land, and other property, that said board may deem necessary or desirable for carrying out the powers and duties conferred upon them by this act."

By § 6 of the St. of 1895, it is enacted that the Metropolitan Water Board "shall forthwith construct the reservoir in Southborough already partially constructed by the city of Boston, and the dams thereof, and assume and carry out the agreement made by said city with the town of Southborough," etc.

The first contention of the plaintiffs on this part of the case is, that the easements and rights which the Metropolitan Water Board may take, under the last clause of § 4 of the St. of 1895, are the easements and rights already in existence when the taking is made, and that, as the city of Boston did not take the right to fill the parcels of land adjoining the lands it took, and as nobody but the owners of these parcels of land had the right to fill them, there was no easement or right to fill these parcels in existence which could be taken except by taking the parcels themselves in fee. We are of opinion that this is not the true construction of the clause.

When land is taken for a public use, it is ordinarily within the discretion of the Legislature to determine whether it shall be taken in fee, so that when the public use is determined the title will remain in the body taking it, or whether it shall be taken only to the extent necessary for the public use, and so long as that use continues; and a taking in the manner last described usually is called the taking of an easement in land. The taking of land for the purpose of laying water pipes in it, under many of our statutes, is a taking of an easement only. The easements and rights in land which are necessary for the proper construction and maintenance of works for the water supply of a large district, such as are contemplated by the St. of 1895, are not usually the easements which may exist between adjoining estates, whereby one is servient to the other, of which the most common is that of a right of way, but are easements and rights

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peculiar to a system of collecting, storing, and preserving the purity of water and distributing it, and the intention of the last clause of § 4 of the St. of 1895 is that the water board may take other lands than those in the section before described in fee, if they deem it necessary or desirable, or may take only easements or rights in such other lands. Whether the taking of land in fee, the land being either a dominant or a servient estate, usually extinguishes easements existing between the estates, or whether, under the last clause of § 4 of the St. of 1895, the water board can take an existing easement or right in land without taking the dominant estate, need not be considered. We are of opinion that the principal purpose of the last clause of § 4 of the St. of 1895 was to empower the water board, when it did not deem it necessary to take lands in fee other than those before described, to take new easements or rights in such other lands as it deemed necessary or desirable for carrying out the powers and duties conferred on the board.

The next contention of the plaintiffs is, that, if the statute is so construed as to authorize the taking of new easements or rights in land, it must be confined to easements or rights in land of a kind actually known to the law. It may be assumed, without deciding it, that, by authorizing the taking of easements or rights in land by the clause mentioned, the Legislature did not intend to authorize the taking of easements or rights in land of a kind unknown to the law. We are however of opinion that the right taken by the taking of January 4, 1896, or by the taking of July 6, 1897, is a right in land which could have been granted and made appurtenant to the lands taken by the water board, and therefore that it is a right in land which may be taken under the statute. It is in effect a right to make and perpetually maintain a dike or mound of earth of a certain height, for the benefit of the adjoining reservoir and system of water supply. The papers before us do not disclose the purpose of the taking, but it may have been for the purpose of creating an embankment of earth to enclose the waters of the reservoir, or of preventing surface drainage into the reservoir from the surrounding lands, or of filling up low lands which might be a source of pollution to the waters. It is not contended that the filling contemplated was not properly adjudged by the water

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board to be necessary or desirable for carrying out the powers and duties conferred upon the board by the statute. The contention is, that the right taken is one of which the statute did not authorize the taking except by taking the parcels of land in fee. Takings for a railroad location or for the laying of an aqueduct usually are takings of an easement, and often involve the construction and maintenance of embankments above the level of the land. A grant by deed of the right to erect and maintain a dam upon the land of the grantor, or an embankment thereon, for the benefit of the land of the grantee, is valid and creates an easement. *Cook* v. *Stearns*, 11 Mass. 533. *Francis* v. *Boston & Roxbury Mill Co.* 4 Pick. 365. *Boston Water Power Co.* v. *Boston & Worcester Railroad*, 16 Pick. 512. *Stevens* v. *Stevens*, 11 Met. 251. *Cobb* v. *Fisher*, 121 Mass. 169. See *Ladd* v. *Boston*, 151 Mass. 585; *Newton* v. *Perry*, 163 Mass. 319; *Towne* v. *Newton*, 167 Mass. 311; *Kuschke* v. *St. Paul*, 45 Minn. 225. We have no doubt that a grant by deed from the plaintiffs to the Commonwealth of the right to fill and maintain the filling of these parcels, in the manner and subject to the reservations contained in the taking of July 6, 1897, for the benefit of the adjoining reservoir and the water supply system owned by the Commonwealth, would be a valid grant, and would operate to create a right in the nature of an easement in the three parcels, and if this right in these parcels could be granted we think it could be taken under the statute. Whether such a right could be acquired by prescription it is unnecessary to determine. The bill, therefore, should be dismissed; but, as the principal if not the sole reliance of the defendants is on a taking made after the bill was filed, no costs should be allowed.

Ordered accordingly.

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J. EDWIN JONES, administrator, & others, *vs.* CHARLES TREADWELL & others.

Suffolk. October 15, 1897. — November 22, 1897.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Real Estate inherited by Heir — Set-off — Statute — Debt due Intestate Estate.

The Pub. Sts. c. 136, §§ 22, 23, which provide that a debt due to the estate of a deceased person from an heir, devisee, legatee, or distributee of such estate shall be set off against and deducted from the share or claim of such heir, devisee, legatee, or distributee, do not relate to real estate inherited by an heir.

APPEAL from a decree of the Probate Court, refusing to grant the petition of the administrator of the estate of Samuel Treadwell and others, praying that the share of Charles Treadwell in the intestate's real estate as heir of the intestate might be sold, and the proceeds thereof be first applied, so far as required, to pay the debt due to the estate from said Charles Treadwell.

The petition to the Probate Court, which was filed March 1, 1897, recited that the said Jones was on May 28, 1896, appointed administrator of the estate of said Samuel Treadwell, who died on April 27, 1896; that he left no widow and eight children, seven of whom were joined as petitioners, and one of whom, Charles Treadwell, who was indebted to his father's estate in the sum of four thousand dollars, and also to the firm of L. Beebe and Sons in about the same amount, was, with said Beebe and Sons and James H. Young, joined as defendant; that the estate of the intestate consisted of real property worth about thirty-five thousand dollars, and of personal property consisting of the claim against Charles Treadwell already described, and other property equal in value to about five thousand dollars in all; that in July, 1896, Beebe and Sons recovered a judgment against Charles Treadwell, and on November 10, 1896, caused his interest in the real estate of the intestate to be seized on execution, and sold by the sheriff on December 26, 1896, to the defendant Young; that no notice of the claim of the administrator of Samuel Treadwell's estate against Charles Treadwell,

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or against his share in the real estate, was given to Beebe and Sons until December 17, 1896, after the land had been seized on the execution; that the petitioners, and especially Jones, as administrator, were entitled, under the provisions of Pub. Sts. c. 136, §§ 22, 23, to have the debt due to the estate of the deceased from Charles Treadwell "paid out of and set off against and deducted from the share or claim of said Charles Treadwell in and to the said real and personal estate belonging to said estate of said deceased, in preference to and before said creditors of said Charles Treadwell can take any part of his share in said estate of said deceased." The prayer was, in substance, that the court should determine the validity and amount of the debt, enjoin any conveyance by Beebe and Sons and Young, order the sale of Charles Treadwell's share in the real estate, and the application of the proceeds to the payment of his debt to the estate.

Charles Treadwell filed an answer, admitting the allegations in the bill, and consenting that the bill might be taken as confessed as against him. Beebe and Sons and Young filed general demurrers for want of equity. The Probate Court entered a decree finding the amount of the debt, determining that there was no lien or claim on the share of Charles Treadwell in his father's real estate in favor of the petitioners as against Beebe and Sons and Young, sustained the demurrers, and dismissed the petition as against L. Beebe and Sons and Young, but gave the administrator license to sell Charles Treadwell's right of redemption from the execution sale. From this decree the petitioners appealed, on the grounds that the Probate Court erred in finding that the petitioners had no lien on Charles Treadwell's share in the real estate, or priority over Beebe and Sons and Young, and in sustaining the demurrers, and in merely giving the petitioners the right to sell Charles Treadwell's right of redemption from the execution sale. The case was reserved by *Morton*, J., at the request of all the parties, for the consideration of the full court.

C. G. Keyes & C. D. Keyes, for the petitioners.

E. W. Hutchins & H. Wheeler, for Beebe and Sons and Young.

FIELD, C. J. The decision of this case depends upon the construction to be given to Pub. Sts. c. 136, §§ 22, 23. These

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sections were enacted in the Public Statutes in the form in which they were reported by the commissioners on the revision of the statutes. The first and only statute on the subject before the enactment of the Public Statutes was St. 1879, c. 225. These sections of the Public Statutes, so far as we are aware, have been considered by the court only in *Allen* v. *Edwards*, 136 Mass. 138. In the opinion in that case the court say that the sections "are substantially re-enactments of the St. of 1879, c. 225, §§ 1, 2, although they vary therefrom in some expressions." St. 1879, c. 225, is entitled "An Act concerning set-off of debts due from legatees under wills, and from distributees of intestate estates." Although the body of the act contains the word "heir," as well as the words "legatee" and "distributee," yet the first section relates to "the payment of the legacy to such legatee," or to "the division and distribution of such estate among the heirs and distributees," and it provides that the "debt due to a testator or intestate, or to his estate, from a legatee, heir, or distributee, . . . shall be taken by such legatee towards his legacy, and by such heir and distributee towards his share in the estate of the intestate." The fourth section is as follows: "Nothing in this act contained shall prejudice any other remedy that an executor or administrator may have for the recovery of a debt due to the testator or intestate, or his estate, from such heir, legatee, or distributee, or release such legatee, heir, or distributee from the surplus of his indebtedness above the amount of his legacy or distributive share in the estate." It is manifest, we think, that this statute related only to personal estate, and provided a new remedy for the administrator of an intestate estate or the executor of a will as a means of collecting a debt due to the estate from a legatee, heir, or distributee, by empowering the Probate Court to apply the debt towards the payment of the legacy or of the distributive share of an intestate estate. *Allen* v. *Edwards*, *ubi supra*. The law on this subject before the enactment of this statute is shown by the following cases: *Procter* v. *Newhall*, 17 Mass. 81; *Ward* v. *Ward*, 15 Pick. 511, 520; *Hancock* v. *Hubbard*, 19 Pick. 167; *Davis* v. *Newton*, 6 Met. 537; *Blackler* v. *Boott*, 114 Mass. 24.

The Public Statutes are to be construed as a re-enactment of the statutes in force when they were passed to be enacted, if

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they reasonably can be. *Drew* v. *Streeter*, 137 Mass. 460. *Pratt* v. *Street Commissioners*, 139 Mass. 559. Chapter 136 of the Public Statutes is entitled "Of the payment of debts, legacies, and distributive shares." Sections 22 and 23 are in that division of the chapter which is entitled "Payment of legacies and distributive shares." The principal points of difference between St. 1879, c. 225, and these sections, are that the word "devisee" has been inserted in the sections in connection with the words "heir, legatee, or distributee"; and that, instead of the provision in the St. of 1879, that the debt due to the estate shall be taken towards the payment of the legacy, or towards the share or distributive share of the heir or distributee, without prejudice to any other remedy to recover the surplus of the debt due, it is provided in the Public Statutes that the debt shall be set off against and deducted from the share or claim of the heir, devisee, legatee, or distributee, without prejudice to the liability of such heir, devisee, legatee, or distributee for the excess of his indebtedness over the amount of his share in or claim upon the estate. Undoubtedly the Public Statutes, if considered as a new enactment, would leave it somewhat uncertain whether it was the intention to empower the Probate Court by some proceedings to order the real estate devised or inherited to be sold, and the proceeds of the sale to be applied to the payment of a debt due to the estate from the devisee or heir, or to establish a lien on such real estate for the purpose of securing the payment of such a debt. But, if such was the intention, the statutes reasonably should have contained some definite provisions whereby that intention could be carried into effect, and should have prescribed some time within which the proceedings should be instituted. The title to real estate ought not to be left indefinitely subject to the institution of such proceedings. In general, the administrator of an intestate estate has nothing to do with the real estate, unless the sale of it is necessary to pay the debts of the estate and the charges of administration, and the executor of a will has nothing to do with the real estate, unless some power is given him by the will over it, or the sale of it is necessary to pay legacies, debts, and charges of administration. The real estate ordinarily passes directly to the heirs or devisees. Administrators or executors cannot set off against or deduct from a

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devise or inherited share of real estate a debt due to the estate in the same manner as they can set off against or deduct such a debt from a legacy or distributive share of personal property which they must pay from the estate in their hands. It is a simple matter to empower a probate court to determine the amount of such a debt, and to set it off against or deduct it from a legacy or a distributive share, when suit must be brought by the legatee or distributee for the legacy or share, unless the executor or administrator chooses to pay it. It may happen in the administration of estates that money or other personal property is held by an administrator or executor, for the benefit of heirs as distinguished from distributees, or of devisees as distinguished from legatees, and these sections of the Public Statutes may perhaps be held to include such cases. But we are of opinion that the St. of 1879, c. 225, was enacted with reference only to what was or should become, in the course of administration, personal property or estate in the hands of the administrator or executor, and that the changes of phraseology in the Public Statutes are not sufficient, and were not intended to alter the substance of the law in this respect.

The decree of the Probate Court dismissed the petition as to Marcus Beebe, Decius Beebe, Junius Beebe, and James H. Young, and authorized J. Edwin Jones, the administrator of the estate of Samuel Treadwell, one of the petitioners, to sell at public auction the right of Charles Treadwell to redeem his real estate from the sale on execution. The petitioners have appealed from the decree, but Charles Treadwell has not. As we are of opinion that the right of redemption of Charles Treadwell in this real estate cannot lawfully be sold by the administrator of the estate of Samuel Treadwell under the authority of the Probate Court, the decree so far as it orders a sale of the right of redemption of Charles Treadwell must be reversed, and the petition must be dismissed.

So ordered.

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HOSEA E. HOLT *vs.* EDGAR O. SILVER & others.

Suffolk. December 9, 10, 1896. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Jurisdiction — Defence — Damages — Equity Practice — Construction of Contract.

A plea and demurrer to the jurisdiction of this court over a suit in equity for breach of contract, and to compel an account and a performance of the contract in other respects, on the grounds that a suit between the same parties reversed and involving the same subject matter is pending in a United States court, and that the present suit is based upon the copyright laws of the United States, and is exclusively within the jurisdiction of the United States courts, are rightly overruled; and the fact that the contract was terminated when the bill was brought makes no difference.

One party to a contract, who, by his own act, has put it out of the power of the other party to comply literally with a provision of the contract as to the giving of notice to terminate it, and another holding by assignment from the former, are not entitled, in a suit in equity for breach of the contract, to rely on such non-compliance.

Expenditures by one party to a contract, caused in greater part by apprehension of injury based upon mere rumors, are not recoverable as damages in a suit for breach of the contract.

The findings of a master, to whom a suit in equity has been referred, on matters of fact, will not be reversed by this court, unless they clearly appear to be erroneous.

The ruling of a master, and a similar ruling of a single justice at the hearing upon exceptions to the master's report, will not be disturbed, on appeal, if all the evidence on the point ruled upon is not before this court.

A. and B. executed a contract, which recited that, as A. was joint author with C. of certain publications known as a music course, and coequal owner of the copyrights and electrotype plates of these publications, and as he was also then the sole publisher of the same, he agreed that B. should have the exclusive right to print and publish the same during three years from the date thereof, with the use of all capital invested, appliances, and the like, theretofore used by him in such business; that B. agreed to print and publish the same, to pay all expenses of such printing and publishing, and to pay A. "a sum of money equal to not less than five or more than fifteen per cent, as may be agreed upon, on the net proceeds of said publications, it being understood that such net proceeds are the receipts from all sales after deducting fifteen per cent therefrom as the sum due to said A. and said C. as joint authors and coequal owners of the copyrights and electrotype plates, etc., as well as the cost of manufacture, and that he will contribute the sum of two thousand dollars as further capital to be secured by said A. and returned to said B. at the termination of this agreement"; and that A. and B. agreed "that to terminate this agreement at the end of three years from the date hereof a notice in writing must be given" in a manner

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specified. Four years later B. purchased the interest of C., and subsequently A. gave B. the notice provided therein for the termination of the contract. *Held*, in a suit in equity by A. against B., that B. was entitled to recover the $2,000 named in the contract.

BILL IN EQUITY, filed October 20, 1894, against Edgar O. Silver, said Silver, Henry C. Deane, Elmer E. Silver, and Frank W. Burdett, "now or lately copartners" under the firm name of Silver, Burdett, and Company, Silver, Burdett, and Company, a corporation, and John W. Tufts, alleging the following facts.

In the four years prior to September 1, 1886, the plaintiff and the defendant Tufts, as joint authors, composed, prepared, and edited a series of books and charts for instruction in music, especially designed for use in public schools and educational institutions, all of which bore the general title of the "Normal Music Course." These books and charts were composed, printed, electrotyped, and published under an agreement between the plaintiff and Tufts, associating themselves together for the purpose of editing and publishing such works, and declaring themselves equal owners of the copyrights of the books and charts and of the plates, and agreeing to continue the editing and publishing of the remaining books and charts of the course, sharing the cost and dividing the profits equally. The plaintiff and Tufts were equal owners in all the books and charts, and the copyrights thereof, and had paid equally the cost of the electrotype plates therefor.

In February, 1883, the plaintiff and Tufts made a contract in writing with D. Appleton and Company, leading publishers in New York City, for the publication of their proposed series of musical books and charts, which contract gave to the publishers the exclusive right of publication for the whole term of copyrights and renewals. Down to March 28, 1885, D. Appleton and Company, as assigns of the plaintiff and Tufts, entered the titles of the books up to that date composed in the office of the Librarian of Congress, and did all other acts and things required by law for securing, perfecting, and maintaining the copyrights on the books.

On or about March 28, 1885, the plaintiff, with the consent and at the request of Tufts, purchased of D. Appleton and

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Company, for the sum of $6,200, paid wholly by himself, all the interest of D. Appleton and Company in the plates and good will of the Normal Music Course or Series, and also, for the sum of $3,871.26, all the stock of the series or books remaining in the hands of D. Appleton and Company, the latter directing that all the plates and stock on hand at their store and at their several agencies be delivered to the plaintiff immediately, or upon his order.

In this way, and by the consent, understanding, and agreement of Tufts, the plaintiff succeeded to the rights held by D. Appleton and Company as sole publishers of the series, under the contract with them, and for the term named therein; and the plaintiff became the sole publisher of the series of books and charts from that date, and alone continued the publication and sale of the same as had been done by D. Appleton and Company. After his purchase from them of their publishing interest and rights and their stock of books, the plaintiff, in carrying on the publishing of the series, expended very large sums of money in the introduction, advertising, and sale of the publications above the sums he received, before September 1, 1886.

During this time, from March 28, 1885, to September 1, 1886, while the plaintiff alone was publishing the series, he and Tufts continued to labor as co-authors, and wrote, edited, and prepared certain of the books included in the Normal Music Course.

On or about September 1, 1886, the plaintiff and the defendant Edgar O. Silver entered into a contract in writing, which recited in the first article that the plaintiff, "as he is joint author" with Tufts of certain publications known as the Normal Music Course, "and coequal owner of the copyrights and electrotype plates, etc." of these publications, "and as he is also at present the sole publisher of the same," agrees that Silver "shall have the exclusive right to print and publish the said series during the term of three years from the date hereof, with the use of all capital invested, appliances, and the like, heretofore used by him in said publishing business; that he will not, without the consent in writing of said Silver, write, print, or publish, or cause to be written, printed, or published during the continuance of this agreement, any other edition of the said series,

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revised, corrected, or enlarged, abridged, or otherwise, or of any series or books of a similar character tending to interfere with or injure the sales of the said series of music books"; in the second article Silver agrees to print and publish the same, to pay all expenses of such printing and publishing, and to pay the plaintiff "a sum of money equal to not less than five or more than fifteen per cent, as may be agreed upon, on the net proceeds of said publications, it being understood that such net proceeds are the receipts from all sales after deducting fifteen per cent therefrom as the sum due to said Holt and said Tufts as joint authors and coequal owners of the copyrights and electrotype plates, etc., as well as the cost of manufacture; and that he will contribute the sum of two thousand dollars as further capital to be secured by said Holt, and returned to said Silver at the termination of this agreement"; and in the third article, that the plaintiff and Silver agree "that to terminate this agreement at the end of three years from the date hereof a notice in writing must be given thirty days at least before the expiration of the first year from the date hereof, and that in default of such notice at the end of the first year a period of one year shall be added to the term of this agreement, and also that in default of such notice at the end of the second or any succeeding year a further period of one year shall be added to the term of this agreement as then existing, so that in any event this agreement cannot be terminated absolutely until the end of two years after that year in which such notice may be given."

At or about the same time, another contract, bearing the same date, was entered into between Tufts, the plaintiff, and Silver, in which Tufts and the plaintiff, as joint authors and coequal owners of the copyrights, electrotypes, etc., of the Normal Music Course, agreed that Silver should have the exclusive right of publication of the same, upon terms therein stated, for the same time as was agreed to in the contract last mentioned, and in which Silver agreed to print and publish the same and pay all expenses of such printing and publishing, and to render annually on the first day of February to Tufts and the plaintiff a statement in writing of the number of copies of the series printed and sold to the first day of January next preceding, and thereupon to pay to Tufts and the plaintiff a sum of money equal to

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fifteen per cent of the net wholesale prices of the publications, to be determined in a specified manner, and containing a provision as to termination of the contract by notice similar to that in the other contract, and also a similar provision as to the publication of competitive books.

Subsequently to September 1, 1886, Tufts and the plaintiff prepared new and revised editions of some of the before mentioned publications, and added others to the same.

Silver received all the assets and accounts previously belonging to the plaintiff and used in the publication, and entered upon the publication and introduction of the books in various schools and cities of the United States, and made payments to the plaintiff and Tufts of the fifteen per cent upon net wholesale prices, as specified in the agreement, and to the plaintiff of five per cent upon the net proceeds of the publications, under the terms of the agreement between them.

During such publication Silver associated with himself one Rogers, under the firm name of Silver, Rogers, and Company, and continued the publication of the books. At the time when Rogers was admitted to the firm he was fully informed of the terms upon which Silver was publishing the works, and was familiar with the contracts hereinbefore specified. Thereafter Rogers retired from the partnership, and the defendants Burdett, Deane, and Elmer E. Silver became members thereof in the place of Rogers, and the name of the firm became Silver, Burdett, and Company. At the time Burdett, Deane, and Elmer E. Silver entered into such partnership they were familiar with all the terms of the agreements hereinbefore referred to, and as members of the firm with Edgar O. Silver entered upon and proceeded to perform the same; and the plaintiff did not object to the admission of Burdett, Deane, and Elmer E. Silver to the partnership, or any of them, or to their interest in the publication under the contracts, but accepted them as joint publishers with Edgar O. Silver and bound by the terms of the agreements; and the copartners of Edgar O. Silver, as they successively became such, adopted, and thereby agreed to fulfil, the undertakings and agreements of Edgar O. Silver contained in the contracts above mentioned.

The firm of Silver, Burdett, and Company made statements

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of the number of books sold, and of the percentages to which Tufts and the plaintiff were entitled under such contracts, and made payments to the plaintiff in accordance with such statements, down to the year 1893.

The copyrights upon the first books published in the Normal Music Course Series were in the names of Tufts and the plaintiff, and upon some of the later publications and revisions in the name of Silver, Rogers, and Company, and of yet later ones in the name of Silver, Burdett, and Company. The plaintiff is unable to state in what name or names each particular book as last published may have been copyrighted, but says that the copyright of every book and chart hereinbefore mentioned belongs one half to himself, and one half to Tufts, or the assigns of Tufts, in whosesoever name or names the same may have been obtained.

On or about December, 1890, Tufts, without the knowledge or consent of the plaintiff, and in violation of good faith as well as of his express agreement with the plaintiff, conveyed all his interest in the Normal Music Course, and in all the electrotypes, plates, and cuts belonging to the authors of such publications, to Edgar O. Silver, either alone or in conjunction with his copartners, all of whom knew that such conveyance was in conflict with the terms of the agreement and of the relations subsisting between Tufts and the plaintiff.

In or during the years 1891 and 1892, Tufts composed or arranged, and the other defendants published and placed upon the market, another series or course of musical instruction, consisting of four books called the "Cecilian Series of Study and Song." Such series is a rival and competing course, and its publication is in violation, on the part of the defendants, of the contracts hereinbefore mentioned made by the parties in relation to the publication of the Normal Music Course.

At some time not long prior to March, 1893, the individuals and copartners made defendants in this case caused themselves to be incorporated under the laws of the State of New Jersey, under the name of Silver, Burdett, and Company. In further violation of their agreements and of the course of such publication, the firm of Silver, Burdett, and Company then conveyed or attempted to convey to the corporation all the copyrights

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upon the works composing the Normal Music Course, all the plates, dies, etc., used in its publication, and all the bound stock and materials, and the rights of publication, resulting from their agreements.

The plaintiff was not informed of this transfer until March, 1893, when he was apprised of the same at the time of receiving the annual sum due him for copyrights. He immediately and in writing notified the defendants of his astonishment at the transfer, or attempted transfer, and that he did not assent to but protested against the same, and to the publication of the series by the corporation, as an abandonment of the contracts made by Edgar O. Silver.

The defendants have paid no heed to the plaintiff's protest or rights under the contracts, all of which are personal and not assignable; but the corporation is at the present time, and ever since January 1, 1893, has been, publishing and selling the Normal Music Course as had before been done by the firm of Silver, Burdett, and Company, and has made even greater sales of such works than were made by the firm in any equal length of time, all without regard to the plaintiff's rights therein, or to his dissent and protest, and without reporting to him in any respect since the beginning of the year 1893.

On July 26, 1892, the plaintiff gave to the defendant Silver, and to the defendant copartners, Silver, Burdett, and Company, the following notice:

"You are hereby notified that I do elect to terminate, and hereby do terminate and end, in two years from the first day of September next, 'a certain written agreement or obligation' made by and between myself, as the publisher of the Normal Music Course, so called, and said Edgar O. Silver, dated September 1, 1886, and also a certain other written agreement or obligation, also dated September 1, 1886, made by and between said Silver as one party, and John W. Tufts and myself, being the joint authors and then coequal owners of the copyright, etc. of said Normal Music Course; both said agreements or obligations having reference to the publication of said Course, so called, and being all the written agreements between said Silver and myself, either alone or with Mr. Tufts, relating to said Normal Music Course and the publication thereof in any way.

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"This notice is given to unquestionably terminate said written agreements, contracts, or obligations, as provided in terms in the same, and is given by me alone, because said Tufts has no longer any ownership or interest in said Normal Music Course, or the copyrights, plates, or attending properties thereof; and by giving this notice I do not admit or intend to concede that either of said written obligations has not been already violated, superseded, and abandoned by said Silver or said Tufts, or both of them, so as to release me therefrom, and I do not waive such violations and abandonment."

Under the "Holt-Silver contract," it has never been agreed by the parties what the percentage between five and fifteen to be paid the plaintiff on the net proceeds of the publications should be; but the defendant copartners paid the plaintiff annually five per cent, and no more, for the time which ended January 1, 1893. For the time subsequent to January 1, 1893, nothing has been paid to the plaintiff under the contract, and no statement of account has been rendered, and no accounting has been had whatsoever.

Under the "Tufts-Holt-Silver contract," the plaintiff received from the defendants his one half share of the fifteen per cent agreed upon as copyright money, with annual statements, as in the contract provided, up to the 1st of January, 1893, and has received no statement of the number of copies of the series printed, or of the number of copies thereof sold, or any account, or any money whatever, for any time since such date, under the contract, the report and payment to him up to that date having been made in March, 1893.

The plaintiff is advised that, as well by the acts of the defendants as by the force and terms of the notice, the contracts heretofore existing between him and the defendants, or any of them, were terminated, and that a settlement of accounts under the contracts, and disposition of the assets used in the publication business, alone remain to be made between the parties to this cause. Upon the termination of the contracts between him and the defendants, the sole right of publication of the Normal Music Course and Series revested in the plaintiff.

Under the "Holt-Silver contract," he is entitled to receive at least five per cent on the net proceeds of all the publications

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constituting the series, to be computed as in the contract provided, resulting from the sales and business of the defendants since January 1, 1893, and to an accounting and adjustment respecting what in the contract is called "capital," contributed by himself and by Edgar O. Silver in the business.

Under the "Tufts-Holt-Silver contract," he is entitled to receive in money one half of fifteen per cent of the net wholesale prices of the publications, to be computed as in the contract provided, with statements of the number of the books printed and the number of books sold by the defendants since January 1, 1893; and he is the owner of an undivided half, with the defendants, of the electrotype and other plates used in printing and preparing the publications, all in the hands of the defendants.

The prayer of the bill was that it be adjudged and decreed that the contracts called the "Holt-Silver contract" and the "Tufts-Holt-Silver contract" were terminated on September 1, 1894, and that the plaintiff and Tufts, or his assigns, are coequal owners of the copyrights of all the books and charts constituting the Normal Music Course, and that the plaintiff has the sole right of publishing the same for the term named in the contract of D. Appleton and Company; that the defendants other than Tufts be ordered to pay to the plaintiff five per cent of the net proceeds of all the publications constituting the Normal Music Course, original or revised, to be computed as provided in the second section of the "Holt-Silver contract," from January 1, 1893, to September 1, 1894, or the termination of the contract; that the defendants other than Tufts be ordered to render to the plaintiff a statement in writing of the number of copies of the series of books and charts printed, and also of the number of copies thereof sold, from January 1, 1893, to September 1, 1894, or until the termination of the contract, and to pay to the plaintiff one half of fifteen per cent of the net wholesale prices of the publications, such prices to be computed and such payment to be made as provided in the "Tufts-Holt-Silver contract," and to deliver to the plaintiff the electrotype and other plates of the publications; and that the defendants be permanently enjoined from publishing or selling any of the books and charts constituting the Normal Music Course or

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Series, in order that the plaintiff might resume the publication of the same alone, and account to Tufts or his assigns for his portion of the copyright money or percentage, as provided in the contract of Tufts and the plaintiff with D. Appleton and Company.

The defendants filed a plea and demurrer to the jurisdiction, on the grounds that a suit brought by the present defendants against the present plaintiff, and involving the same subject matter as that of the present suit, was pending in the Circuit Court of the United States for this district; and that the present suit was based upon the copyright laws of the United States, and was exclusively within the jurisdiction of the courts of the United States. The plea and demurrer were overruled; and the defendants appealed to the full court.

The case then came on to be heard, and an interlocutory decree was entered, adjudging that the contract made by the defendant Tufts and the plaintiff with D. Appleton and Company was cancelled by the parties, and not assigned by D. Appleton and Company, and that no other contract was made which would give to the plaintiff the exclusive right of publishing the Normal Music Course; that the contracts made between the plaintiff and the defendant Edgar O. Silver, and between Tufts and the plaintiff as parties of the first part, and Silver as party of the second part, were terminated on September 1, 1894, by the notice given to Silver and to Silver, Burdett, and Company, in July, 1892; that the plaintiff on the one hand, and the defendant Edgar O. Silver as the assignee and equitable owner of the interest of Tufts on the other hand, were respectively each the owner of one half of each and all of the copyrights of all the books and charts constituting the Normal Music Course, and that each half owner had an equal right of publishing under such copyrights; and the defendants were ordered to transfer, assign, and convey to the plaintiff one half of each and all of such copyrights standing in their names or in the name of either of them; that the contracts did not debar the defendants from the right of publishing the Cecilian Series of Study and Song, written by Tufts, and published by the other defendants; that the publication and sale by the plaintiff, to the extent which was done, of his book and charts entitled "H. E. Holt's New and Improved

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Normal Course in Music, First Reader," and charts published under the general title or as a part of H. E. Holt's New and Improved Normal Course in Music, before the termination of the contracts on September 1, 1894, was such a breach of the contracts as would be a ground of recoupment in an accounting for copyright percentages under the contracts, but not such a breach or wrong as would deprive the plaintiff of the benefit of his notice to terminate the contracts; and referring the case to a master, to state the amounts due to the plaintiff from the defendants, or either of them, under the contracts dated September 1, 1886, stating the amount due to September 1, 1894; to state the amount of injury sustained by the defendants prior to September 1, 1894, from the publication by the plaintiff of the book entitled "H. E. Holt's New and Improved Normal Course in Music, First Reader," and his charts, or other breach of the contract; and to state the number of sets of stereotype plates in the possession of the defendants, and used in or for the publication of the Normal Music Course, and the value thereof.

From this decree the defendants appealed to the full court.

The master found and reported the following facts.

The plaintiff, in conjunction with the defendant Tufts, was an author and joint owner of a series of music publications, consisting of nine books, graded from a first reader for children to a manual for teachers, and two sets of charts, all of which constituted what was called "The Normal Music Course." The series was designed to embody a system of teaching music invented by the plaintiff, originally set forth in the books and charts, but afterwards more or less changed by the plaintiff. The defendant Silver was a publisher, whose rights under the contracts referred to in the bill had been assigned to a corporation known as Silver, Burdett, and Company.

From the transactions between the plaintiff and this corporation under these contracts, it appears that the plaintiff assented to this assignment so far as to make him responsible to the corporation for any breach of the contracts on his part, and the corporation is responsible to the plaintiff for the royalties due under them.

A notice to terminate was given by the plaintiff in July, 1889, but this was subsequently waived. On July 26, 1892, he gave

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another notice to terminate the contract upon September 1, 1894, which was not waived.

The defendant Silver, upon December 10, 1890, purchased the interest of the defendant Tufts, which purchase gave to him an equal right with the plaintiff to publish under the copyrights, and entitled him to seven and one half per cent of the net wholesale price under the "Tufts-Holt-Silver contract."

Subsequently to September 1, 1894, the date of the expiration of the contract, the defendant Silver, Burdett, and Company continued to publish and is still publishing the series by virtue of the authority given to it under the assignment by Tufts of his interest in the copyrights; and still has in its possession and uses the sets of stereotype plates formerly paid for and owned jointly by the plaintiff and the defendant Tufts.

The amount of royalties due to the plaintiff up to September 1, 1894, was $7,488.25.

At the request of the defendants, the master found that the amount of royalties due the plaintiff upon August 1, 1893, at which time the first edition of the plaintiff's alleged infringing book was published, was $1,677.70.

The evidence in support of the defendant corporation's contention that the plaintiff had broken his contract with it, and that it was therefore entitled to damages by way of recoupment, was substantially as follows.

The plaintiff commenced work in the spring of 1893 upon the preparation of a new First Reader, over eighty per cent of which was in and taken from the original publication, being assisted in his work by a well known professor of music. The plaintiff had printed one edition of 1,053 copies of this reader prior to August 1, 1893, and a second edition of 2,000 copies between August 1, 1893, and January 1, 1894. Of the total edition of 3,053 copies, 2,054 copies were sold by him between September 14, 1893, and September 1, 1894, the balance not being disposed of in any way prior to September 1, 1894. Of this number sold, about 100 were exchanged at Lexington for the First Reader of the Normal Music Course.

Some time in 1892 the plaintiff invented and had printed three so called drill charts; these consisted of three sheets bound with the sheets in the book of charts. These new drill

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charts were invented to carry out different new ideas. They were made for the Normal Music Course, and were not competing charts. In addition, however, to these drill charts, the plaintiff had printed other sheets, one half of the material of which was in the old chart.

Of the bound sheets called "Book of Charts," he had printed 511 copies, which were delivered to him in October, 1893. In the summer of 1893 he had received a few specimen pages of the new chart, some of which he exhibited in Chicago later in the same year to one of the leading public school music teachers, and which he had used in his teaching. Of the 511 sets of charts, the plaintiff sold 100 copies prior to September 1, 1894, the rest of the edition remaining in his possession.

The purchasers of the books and the charts consisted of music teachers, school committees, booksellers, and others, who resided in various parts of the country.

There was also evidence that as early as 1890 the plaintiff had spoken about getting out a new course, and from 1891 to 1893 there was a general understanding among the possible purchasers of the series that he was to get out a new course.

It further appeared in evidence that three or four pages of the new book were distributed before its publication to seventy-five or one hundred of the plaintiff's pupils to help them in the study of intervals; and that in 1891 circulars had been printed and distributed by the plaintiff announcing the opening of his summer and winter schools, and calling attention to the plaintiff's "New and Original Normal System of Teaching Vocal Harmony."

The plaintiff testified that he was continually improving his method and system of teaching, and that the changes of the charts and books were necessary in order to carry out his latest ideas; that the old charts were still in use in the Boston schools; that he had never advertised his new course, or had it reviewed, nor had he put any of his publications on public sale, and that he had not commenced the preparation of his book until the spring of 1893; that he always advocated and used the old course, even after September 1, 1894, in his summer schools; and that the copies so used were furnished by the defendants.

The defendant corporation contended that the plaintiff was

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responsible in damages, not only for the writing, printing, and publishing of the book and charts, but also for the general understanding among possible purchasers of a future publication by him of a rival book, which understanding was caused by the wide dissemination of his books and charts, and by his oral utterances from the platform, and which resulted in a decreased sale of the books and charts published under the contracts.

"It is evident from the evidence that the plaintiff did break his contract in writing, printing, and publishing 3,000 copies of the First Reader, and 511 copies of the chart referred to, prior to September 1, 1894; and I so find.

"It may also be true that he broke his contract with the defendant corporation in exhibiting the advance pages of his new chart and book, or in publishing them in any way. But, so far as such actions were concerned, the defendant corporation did not satisfy me that it had or could have been damaged in any way thereby. The publication of the circulars was not a breach of the contract, as they referred to a system of teaching, and not to any publication connected with the Normal Music Course, and the plaintiff was under no obligation to desist from improving his method of teaching, and of advertising the same.

"The defendant corporation did not satisfy me that the general understanding among possible purchasers of the series, from 1891 to 1893, had reference to the publication of the plaintiff's new book before September 1, 1894, (and he had a legal right to publish after September 1, 1894, and to advertise the same,) or that the plaintiff was in any way legally responsible for such understanding. According to the evidence, I find, therefore, that the plaintiff had done nothing in violation of the contract until the spring of 1893, when he commenced work upon the new First Reader and chart."

The defendant corporation contended that the damages to which it was entitled by reason of the plaintiff's action should be measured: 1. By loss of profits upon sales of the new series admitted to have been made by the plaintiff, and estimated by the defendant corporation at $941.67. 2. By the damage to the interest of the defendant corporation in the Normal Music

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Course as a publishing property, estimated at $7,222.26. 3. By the loss of profits, January 1 to September 1, 1894, due to falling off in sales, estimated at $3,232.72. 4. By the extra expense to the defendant corporation incurred during the period prior to September 1, 1894, while the plaintiff was preparing, printing, and publishing his new publication, on account of the efforts of employees to counteract the damaging effects due to the plaintiff's actions and rumors thereof, estimated at $6,206.09. 5. By the extra expense in the employment of a special expert from February 1, 1891, to September 1, 1893, necessitated in order to protect the interest of the defendant corporation in the Normal Music Course from the doings of the plaintiff during that period, in preparing, printing, and publishing a new edition, estimated at $6,192.66. 6. By the expense incurred in maintaining summer schools in 1892, 1893, and 1894, for the same purpose, estimated at $3,327.56. 7. A further sum of $2,000 was claimed under article two of the "Holt-Silver contract."

Evidence bearing upon the second, third, fourth, fifth, and sixth claims was admitted, and the master found as follows:

"1. The defendant corporation is undoubtedly entitled to loss of profits upon the admitted sales, that is, 2,054 books and 100 charts. In estimating these profits I have adopted the rule generally accepted in ascertaining common law damages for breach of copyright; that is, the plaintiff is to account for every copy of his book and chart sold as if it had been a copy of the defendant corporation's, and to pay the defendant corporation the profit which it would have received from the sale of so many additional copies. The total amount of profit upon the 2,054 books sold I find to be $323.50, and upon the charts sold, $539.

"2. The defendant corporation is not entitled to any damages for injury to its property as publishing property. The damage claimed was the diminution in the market value of the property as publishing property upon September 1, 1894, caused by the falling off in the profits shown to have been incurred during the year 1894 prior to September 1, and claimed to have been due to the plaintiff's action. The rights of the defendant corporation to publish under the contract ceased upon September 1, 1894. The defendant corporation had a right to publish after

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September 1, 1894, acquired from Tufts, but the plaintiff was under no obligation to Tufts, nor liable under the contract, for any damage to his right to publish. I find, therefore, as matter of law, that there was no market value upon September 1, 1894, of the right to publish under the contract, and that therefore there was no damage to the market value of the publishing rights as a piece of property. Even assuming that there was such a market value, and that it was damaged, the defendant corporation did not satisfy me that the decrease was in any way due to the actions of the plaintiff. The decrease was based upon the falling off of the sales in 1894, as compared with the average rate of increase of sales in the years preceding. In two of the preceding years the sales had decreased through no fault of the plaintiff, and for no given reason.

"3. The defendant corporation is, for the reasons above given, not entitled to any loss of profits upon sales which would have been made had the same ratio of increase continued during the year 1894 as held on the average for the years preceding, during which the contract was in force.

"4 and 5. The defendant corporation is not entitled to recover for extra expense during the period up to September 1, 1894, claimed to be due on account of services of regular employees, or of the special expert, in counteracting the damaging effect alleged to be due to the plaintiff's actions, and rumors thereof. As has already been found, the plaintiff was not legally responsible for such rumors; but if he had been responsible, the defendant corporation failed to satisfy me that such expense was reasonably necessary to protect its interests under the contract against any action of the plaintiff, or was a natural or probable result of any breach of the contract.

"6. The defendant corporation is not entitled to expense incurred in maintaining summer schools, for the reasons above mentioned.

"7. The defendant corporation is not entitled to recover the $2,000 referred to in the 'Holt-Silver contract.' It was contributed by the defendant Silver as further capital; was to be 'secured' by the plaintiff, and was to be 'returned' at the termination of the agreement. At the time when the contract was made, the plaintiff supposed, as appears upon the face of the con-

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tract, that he had the sole right to publish. In my opinion, the parties then contemplated that upon the termination of the contract the sole right to publish would return to the plaintiff. If this had been the result, it is apparent that the $2,000 extra capital which had been used in extending the business of publishing the series, and which to that extent had increased the value of the right to publish, would have inured to the plaintiff's sole benefit. The sole right to publish did not return to the plaintiff. The defendant corporation, by virtue of the assignment from Tufts, continues to publish the series, and is receiving the benefit of the $2,000 extra capital, so far as it has increased in value the right to publish jointly with the plaintiff. He does not therefore seem to me to be entitled to receive the $2,000."

The only evidence as to the number of sets of stereotype plates in the possession of the defendant corporation, and their value, used in and for the publication of the Normal Music Course, consisted of estimates of an expert who had examined the plates; and the details of these estimates were recited in the report.

Annexed to the master's report was a partial report of the evidence offered before him by the defendants "upon the question of recoupment of damages," and the printed record also contained a condensed report of evidence "relating to the validity of the notice given by the plaintiff to the defendants to terminate the Holt-Silver contract and the Holt-Tufts-Silver contract," and "relating to the transfer to the defendant corporation of the rights of Edgar O. Silver under said contracts," being all the evidence "which the parties desire to have reported."

The defendant Silver, among other things, testified as follows:

"*Q.* Now, by reason of the writing, printing, and publishing by Mr. Holt of his new publication prior to September 1, 1894, was your house involved in expense in the way of salaries and travelling expenses of agents or otherwise? *A.* We were obliged to increase those expenses by a considerable amount.

"*Q.* What expenses are directly attributable to the action of Mr. Holt? *A.* In the first place, the regular agents and representatives of the house were called upon to devote a considerable

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amount of their time to making extra journeys, and to carrying on a large amount of extra correspondence, by reason of the fact that they came constantly in contact with the impression in the minds of customers of the house and others that Mr. Holt had begun to publish a revised and improved edition of the Normal Music Course.

"*Q.* Well, now, can you estimate the additional expenses and salaries which you were put to? *A.* Well, as I have figured, the extra expenses, that is, salaries and travelling expenses, etc., of Silver, Burdett, and Company during the period when Mr. Holt was preparing, printing, and publishing his new publication prior to September 1, 1894, which were incurred on account of the efforts of the regular agents and employees to counteract the effect of the impression which was spread abroad, and to protect the Normal Music Course from damage on that account, amount to — leaving out very many items which I think were actually matters of expense directly due in that way — $6,206.

"*Q.* Did you employ any special persons, or make any special efforts, outside of the ordinary business efforts which the house would make, to meet this publication of Mr. Holt; if so, whom did you employ, and what did you do? *A.* In addition to the efforts of our regular agents and representatives and employees, we employed Professor Russell from February 1, 1891, to September 1, 1893, I think; we also carried on summer schools for the instruction of teachers on lines similar to those which Mr. Holt was carrying on in his own classes.

"*Q.* Was Professor Russell employed and were your summer schools instituted by reason of Mr. Holt's publication? *A.* Professor Russell was employed entirely because we were told that Mr. Holt was preparing and about to publish this, and the summer schools were started for the same reason, and have been continued ever since."

On the question of market value, the defendant Silver put in the following evidence: "This diagram shows the whole length of time of the duration of the contract, beginning September 1, 1886, and assuming that it terminated September 1, 1894. The first full copyright year began January 1, 1887; during that year the royalties amounted to $1,363.96, and as that figure

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would be exactly fifteen per cent of the net sales, assuming that the sales were made at wholesale prices, and reckoning those sales made at wholesale prices, the net sales for that year would have amounted at that rate to $9,093.06. For the next copyright year, 1888, the copyright royalty amounted to $1,274.60, a very slight falling off, and the sales, on the basis of the wholesale price, amounted to $8,497.33. For the next copyright year, 1889, the copyright royalties amounted to $2,718.66, and the sales to $18,124.60. For the next copyright year, 1890, the royalties were $3,209.55, and the sales were $21,397. For the next copyright year, 1891, the royalties were $4,529.48, and the sales were $30,196.53. For the next copyright year, 1892, the royalties show a very slight falling off, being $4,451.99, and the sales amounted to $29,679.93. For the year 1893 the royalties amounted to $7,692.57, and the sales to $51,283.80. For the year 1894, the next full copyright year, the royalties amounted to $6,580.64, and the sales amounted to $43,870.93."

The defendants filed seven exceptions to the master's report, all of which, at the hearing before *Allen*, J., were overruled, except the seventh, which was sustained, and was as follows: "The master erred in finding that the defendants were not entitled to recover the $2,000 referred to in the 'Holt-Silver contract,' for the reason that, having found the said sum of $2,000 had been contributed by the defendant Silver in accordance with the terms of the contract, he should have found that upon the termination of the contract the defendant was entitled to a return of the said $2,000 in accordance with the provisions of the contract."

A final decree was thereupon entered, adjudging as follows.

1. That the contract made by the defendant Tufts and the plaintiff with D. Appleton and Company was cancelled by the parties, and not assigned by D. Appleton and Company; and that no other contract was made which would give to the plaintiff the exclusive right of publishing the Normal Music Course.

2. That the contracts made between the plaintiff and the defendant Edgar O. Silver, and between Tufts and the plaintiff, as parties of the first part, and Silver as party of the second part, were terminated on September 1, 1894, by the notice given to Silver and to Silver, Burdett and Company in July, 1892.

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3. That the plaintiff on the one hand, and the defendant Edgar O. Silver as the assignee and equitable owner of the interest of Tufts on the other hand, are respectively each the owner of one half of each and all of the copyrights of all the books and charts constituting the Normal Music Course, and that each half owner has an equal right of publishing under such copyrights.

4. That the defendants and each of them are ordered to transfer, assign, and convey to the plaintiff one half of each and all of such copyrights standing in their names or in the names of either or any of them.

5. That the publication and sale by the plaintiff to the extent which was done of his books and charts entitled "H. E. Holt's New and Improved Normal Course in Music," and of charts published under the general title or as a part of "H. E. Holt's New and Improved Normal Course in Music," before the termination of the contracts on September 1, 1894, was such a breach of the contracts as would be a ground of recoupment in an accounting for copyright percentages under the contracts, but not such a breach or wrong as would deprive the plaintiff of the benefit of his notice to terminate the contracts; and that the defendants are entitled to recoup the sum of $862.50, together with interest from September 1, 1894, amounting on May 1, 1896, to $86.26, namely, $948.76.

6. That the plaintiff is entitled to recover royalties and percentages from the defendants, other than and excepting the defendant Tufts, under said contracts, with interest thereon to May 1, 1896, amounting to $8,405.02.

7. That the plates from which the books and charts of the Normal Music Course were printed are of the value of $2,877.68, to one half of which value the plaintiff is entitled; and that the defendants other than Tufts pay to him one half of such value, namely, $1,438.84, with interest from September 1, 1894, such interest amounting, on May 1, 1896, to $143.88, making the entire sum of $1,582.72.

8. That the seventh exception of the defendants to the report of the master be sustained, and the defendants recover of the plaintiff, under the second paragraph of the "Holt-Silver contract," the sum of $2,000, with interest thereon from Sep-

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tember 1, 1894, such interest to May 1, 1896, amounting to $200, and making a total of $2,200; and that all the other exceptions to said report be overruled.

9. That the defendants, excepting the defendant Tufts, pay to the plaintiff the sums hereinabove awarded him, less the recoupment and $2,000 item, to wit, the sum of $6,838.98, together with his costs of suit.

The defendants appealed from this decree, and the plaintiff also appealed from the eighth clause thereof, to the full court.

The case was argued at the bar in December, 1896, and afterwards was submitted on briefs to all the justices.

A. Hemenway & A. Lord, for the defendants.

S. J. Elder & A. S. Hall, (*E. A. Whitman* with them,) for the plaintiff.

LATHROP, J. 1. The defendants' plea and demurrer to the jurisdiction of the court were rightly overruled. The suit is in effect one for breach of contract, and to compel an account and a performance of the provisions of the contract in other respects. There is no doubt that the State courts have the power, and it is their duty, to decide any federal question arising collaterally in respect to the existence or validity or construction of a patent. *Nash* v. *Lull*, 102 Mass. 60. *David* v. *Park*, 103 Mass. 501. *Binney* v. *Annan*, 107 Mass. 94. The fact that the contracts were terminated when the bill was brought makes no difference, because there were rights accruing under them to be determined and enforced.

2. The defendants contend that the notice dated July 26, 1892, given by the plaintiff alone, was insufficient to terminate the contract, because the defendant Tufts did not join in giving it. But at that time Tufts had no interest in the contract, since, by the procurement of the defendant Silver, Tufts had assigned his interest to him. The defendant Silver, therefore, by his own act had put it out of the power of Holt to comply literally with the provisions of the agreement as to notice, and the other defendants, holding by assignment from him, stand in no better position. *Eliot National Bank* v. *Beal*, 141 Mass. 566, 568. *United States* v. *Peck*, 102 U. S. 64. To oblige Holt, under the circumstances, to show that Tufts had refused to join in the notice is unnecessary in order to do equity between the plaintiff

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and the defendants. They should not be heard to complain or to insist on a formality which they have rendered impossible of performance, or at the best entirely unnecessary.

3. The master has found that the defendants are entitled to recoup the profits made by Holt on the sales made by him in violation of the Holt-Silver contract under the following rule of damages. The plaintiff is to account for every copy of his book and chart sold as if it had been a copy of the defendants', and to pay to the defendants the profits which they would have received from the sale of so many additional copies. This finding and ruling was not excepted to by the defendants, and has not been objected to by them on appeal. The defendants, however, put in evidence before the master to show further damages, and various questions arise upon their exceptions relating thereto.

We have no occasion to consider in this case whether, if the profits are accepted, further damages can be allowed. See *Neilson* v. *Betts*, L. R. 5 H. L. 1, 22; *De Vitre* v. *Betts*, L. R. 6 H. L. 319, 321; *Livingston* v. *Woodworth*, 15 How. 546; *Elizabeth* v. *Pavement Co.* 97 U. S. 126, 139; *Callaghan* v. *Myers*, 128 U. S. 617, 665.

In regard to the amounts claimed by the defendants for extra expenses for services of employees, experts, maintaining summer schools, etc., the master has found that the expenditures were not reasonably necessary, and not a natural result of the breach of contract. It further appears, from the testimony of the defendant Silver, that these expenditures were caused in greater part by apprehension of injury based upon mere rumors. Such expenses are not recoverable as damages. *Sibley* v. *Hoar*, 4 Gray, 222. Moreover, on the evidence, it does not clearly appear that there was a mistake or error in the findings of the master on these points.

The master found that there was no market value of the right to publish under the contract on September 1, 1894. On that day the contract was terminated, and there was no further right to publish under it. It further appears that the master found that, assuming that there was a market value, any decrease in such value was not due to the act of the plaintiff. The evidence of market value offered by the defendant Silver was based on

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the computation of the annual increase in value. This increase was shown as a fact not to be constant, for in two years out of seven there was an actual decrease rather than an increase. It cannot be said, therefore, that the master was clearly in error when he found that the decrease in 1894 was not shown to be due to the breach of contract by the plaintiff.

The same kind of evidence was offered to show loss of profits. The master found that he was not satisfied by the evidence that the loss of profits in 1893–94 was caused by the acts of the plaintiff. While some loss of profits may have been caused by the plaintiff's acts, yet this was a matter for the master to determine as a fact; and it cannot be said that he erred in finding that the evidence did not prove that the damage claimed resulted from the acts of the plaintiff.

4. It is contended by the defendants that the breach of the contract by the plaintiff should deprive him of any right to recover royalties accruing subsequently to such breach, and before September 1, 1894. The master and the single justice ruled otherwise. It is a sufficient reason for refusing to disturb their ruling that all the evidence on this point is not before us. The evidence annexed to the master's report is admittedly incomplete, and most of it is expressly stated to be on other points. It is impossible, therefore, for us to reverse the rulings made.

5. The remaining question is as to the sum of two thousand dollars which it is contended, by the terms of the contract made on September 1, 1886, between Holt and Silver, was payable by the former to the latter at the termination of the contract. In the first article of this contract it is recited that Holt is joint author with Tufts of certain publications known as the Normal Music Course, and coequal owner of the copyrights, electrotype plates, etc. of these publications, and that he is at present the sole publisher of the same. He then agrees that Silver is to have the exclusive right to print and publish the same during three years from the date of the contract, with the use of all capital invested, appliances, and the like, theretofore used by him in said business. In the second article Silver agrees to do the publishing and pay all expenses of printing, and to pay Holt a sum of money equal to not less than five or more than fifteen

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per cent, as may be agreed upon, on the net proceeds of the publications, "it being understood that such net proceeds are the receipts from all sales after deducting fifteen per cent therefrom as the sum due to said Holt and said Tufts as joint authors and coequal owners of the copyrights and electrotype plates, etc., as well as the cost of manufacture; and that he will contribute the sum of two thousand dollars as further capital to be secured by said Holt, and returned to said Silver at the termination of this agreement." By the third article Holt and Silver agree that to terminate the agreement at the end of three years from the date thereof, a notice in writing must be given thirty days at least before the expiration of the first year from the date, and that in default of such notice at the end of the first year, the period of one year shall be added to the term of the agreement, and also that, in default of such notice at the end of the second or any succeeding year, a further period of one year shall be added to the agreement as then existing, so that in any event the agreement cannot be terminated absolutely until the end of two years after that year in which such notice may be given.

On December 10, 1890, Silver purchased the interest of Tufts, and the notice given by the plaintiff to terminate the contract was dated July 26, 1892. It is contended that the defendant Silver is not entitled to recover the two thousand dollars referred to in the contract of September 1, 1886, because the plaintiff supposed that he had the sole right to publish, as appears from the contract itself, and that it was contemplated that upon the termination of the contract the sole right to publish would return to the plaintiff, and that this sole right did not return to the plaintiff, as the defendant Silver by virtue of the purchase from Tufts continues to publish the series, and is receiving the benefit of the two thousand dollars extra capital so far as it has increased in value the right to publish jointly with the plaintiff.

But we are of opinion that this is no answer to the express contract which the parties made, namely, that the two thousand dollars should be returned by Holt to Silver at the termination of the agreement. The contract could be terminated only in the manner provided in the third article, so that it cannot be said, as has been suggested, that a termination of the contract by

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notice was not contemplated by the parties. The fact that the defendant Silver continues to publish the series by reason of an independent title derived from Tufts cannot affect the obligation imposed upon the plaintiff under the Holt-Silver contract.

The result is that the decree must be

Affirmed.

REBECCA F. COFFING *vs.* JOHN L. DODGE.

Berkshire. September 14, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

New Trial — Verdict — Rule of Superior Court — Action — Contract — Instructions — Statute of Limitations.

If a bill of exceptions does not disclose what evidence, if any, was produced at the hearing of a motion for a new trial, made upon the ground that the jury in assessing damages for the plaintiff did not adopt the rule given by the judge in his instructions, and shows that the judge ordered the verdict to be set aside unless the plaintiff would remit a certain sum, which remittitur was made, and does not disclose that the defendant requested any rulings of law or excepted to any given by the judge, the exception alleged on the ground that he was entitled to a new trial as a matter of right will be overruled.

Whether the 45th Rule of the Superior Court, allowing a general verdict to be amended and entered upon one of several counts, is applicable to a case where the declaration contains several counts which are good and are not for the same cause of action, *quære*.

In an action for breach of a contract to invest the plaintiff's money safely, for fraudulent representations as to the investment, and for negligence in such investment, it appeared that the plaintiff, having a less sum in the bank than the whole amount dealt with in the alleged contract, was asked by the defendant if she did not wish to invest her money, and she replied that she did and asked him to get for her some of the investments which he had described to her; that when, from time to time after this interview, he notified her that he had securities for her, she gave him bank checks, sometimes for amounts larger than the face of the securities, until the whole face amount of the securities and of the bank checks was a certain sum on a day named, and that only one of these investments was made within six years next before the date of the writ. *Held*, that instructions which allowed the jury to find that there was an entire contract to invest the whole sum, which was not to be completed until after the date so named, were erroneous.

At the trial of an action for breach of a contract to invest the plaintiff's money safely, for fraudulent representations as to the investment, and for negligence in such investment, the defence to which is the statute of limitations, if there is

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no evidence of any concealment of the cause of action by the defendant, except his failure to disclose from the outset certain matters which it is contended the relation in which he stood to the plaintiff made it his duty to disclose, instructions from which the jury must have understood that their finding upon this matter should be in favor of the defendant, unless they found that he had fraudulently concealed from the plaintiff his cause of action, are not open to objection.

CONTRACT, for breach of a contract to invest the plaintiff's money safely, with counts in tort for fraudulent representations as to the investment, and for negligence in such investment. The answer, among other defences, set up the statute of limitations. After the former decision, reported 167 Mass. 231, the case was tried in the Superior Court, before *Hardy*, J.

The jury returned a verdict for the plaintiff in the sum of $8,948.20; and the defendant alleged exceptions, which appear in the opinion.

M. Wilcox, (*F. H. Wright* with him,) for the defendant.

G. C. Warner, (*H. C. Joyner* with him,) for the plaintiff.

BARKER, J. 1. The defendant, after verdict, moved for a new trial, alleging that in the assessment of damages the jury did not adopt the rule given by the court, but some rule inconsistent with the instructions, and so rendered a verdict in excess of the amount authorized by their instructions. Upon the hearing of this motion the court ordered the verdict to be set aside unless the plaintiff should remit the sum of $1,500, and that, if the defendant should waive his exceptions taken at the trial, the verdict should be set aside unless the plaintiff remitted $1,800. The defendant declined to waive his exceptions, and the plaintiff remitted the $1,500, and the defendant excepted to the order of the court, because he was not allowed a new trial as a matter of right.

The allegations of the motion for a new trial were allegations of fact. The bill of exceptions does not disclose what evidence if any was produced at the hearing of the motion, and we may assume that it consisted only of calculations similar to those in the defendant's brief, which purport to show that, if the jury allowed damages upon all the transactions for which they could assess damages, their verdict was in excess of any amount which could be found by applying to the evidence the instructions of the court. The order to remit from the verdict shows that in

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the opinion of the presiding justice the jury erred. But it is not shown whether this error came from their mistake, either as to the evidence or in following the rule. It does not appear that they wilfully disregarded their instructions. The bill of exceptions does not disclose that, upon the motion for a new trial, the defendant requested any rulings of law, or excepted to any given by the court. This court, upon exceptions, cannot revise the discretion of the Superior Court in granting new trials, and can revise only their rulings of law. Assuming that the court refused to rule that the defendant was entitled to a new trial as matter of right, and assuming, without deciding, that proof that the jury adopted a rule of damages inconsistent with the instructions would entitle the defendant to a new trial as matter of right, there is no finding and no necessary conclusion that the jury did not adopt the rule of the court, and follow it as well as they could. In any aspect of the case, this exception, taken in the course of the proceedings upon the motion for a new trial, must be overruled.

2. We think it well to mention another matter arising after verdict. The case went to the jury upon three counts, one for breach of a contract to invest the plaintiff's money safely, one in contract for negligently investing her money in unsafe securities, and one in tort for misrepresentations whereby she was induced to allow the defendant to put her money into such securities. Each of these counts, as an act of pleading, was a good count, and they were not for the same cause of action. The verdict was general, and there were no special findings. After verdict, the court, under Rule XLV. of the rules of the Superior Court, upon motion of the plaintiff and hearing, ordered that the verdict be amended and entered upon the count in tort. We doubt whether the rule was applicable to such a case, and think it was intended only to apply when there is but one cause of action and a general verdict upon several counts, some of which are bad and some good. There is no corresponding rule of this court; but it has always been a rule of the Superior Court and of the Court of Common Pleas. Formerly, if a general verdict was rendered on all the counts of a declaration, and any of the counts were materially defective, the judgment must be reversed. See *Kingsley* v. *Bill*, 9 Mass. 198. But in

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Baker v. *Sanderson*, 3 Pick. 348, it is said, "The rule is, that where there is but one cause of action, and there are several counts, and a general verdict is returned, the court will not arrest judgment although one count be bad, but will allow the verdict to be altered so as to refer to the good count. . . . For as there is but one cause of action, it is immaterial on which count the verdict is taken, or whether it be general or special." And in *West* v. *Platt*, 127 Mass. 367, this rule, which was then Rule XXXIV., was cited in the decision of a case in which there was but one cause of action and several counts. If, as we think, the rule of the Superior Court was intended to apply only where the counts were for the same cause of action, it was not properly applied in the present case. It is not, however, necessary to discuss this matter further, or to decide it, as in the present case the exceptions taken and to be considered apply equally whether the verdict is considered as specially referred to the count in tort, or as general upon the three counts.

3. The amount of the verdict shows, and it is not contended otherwise by the plaintiff, that the jury awarded damages in respect of each of the investments, while but one of those investments was made within six years next before the plaintiff's writ. Under the instructions to which the defendant excepted, the jury could find that the cause of action for damages in respect of all the transactions but the last was not barred by the statute only by finding, either that one entire contract, not to be completed until after May 18, 1889, and under which nothing was to be due to the plaintiff until the entire completion of the contract, if the defendant should make any denial concerning it, was made between the plaintiff and the defendant for the investment of the whole of the plaintiff's money which the defendant invested, or by finding that the defendant had fraudulently concealed from the knowledge of the plaintiff her cause of action, in which case the plaintiff's whole damages might be saved under Pub. Sts. c. 197, § 14. To whichever count the verdict is referred, the jury could not assess damages in respect to any investment except the latest in date, unless it found one of these two states of fact; and if it found either state of fact, the statute of limitations would be no bar to any claim urged under either count.

The bill of exceptions contains nothing from which it can be

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known which of these two states of fact was found, nor does it show that both were found, and therefore, if there was error in allowing the jury to find either, the exceptions must be sustained and the verdict set aside.

We are of opinion that there was no evidence upon which the question whether there was a contract to invest the whole money should have been submitted to the jury, and that the defendant's exceptions to that portion of the charge which allowed the jury to so find must be sustained.* The whole evidence upon this point is stated in the bill of exceptions, and it consists in the testimony of the plaintiff and the defendant at the jury trial, and of the auditor's report, which was in favor of the defendant, but which recited facts found by the auditor upon which the parties relied at the jury trial.

If there was such a contract it must have been made at or before the time of making the first investment, and we find nothing in the conversation or acts of the parties, either at their first interview or on any occasion to which the evidence relates, to support the contention that there was an entire contract not

* The portion of the charge referred to was as follows:

"The contention has been made that this contract between the plaintiff and the defendant was an entire contract. That is, that on June 15, 1888, she entered into a contract with him to invest a certain amount of money. I do not know as it has been claimed by the plaintiff that there was an absolute contract to invest the sum of $8,500. You have evidence here tending to show that he wrote her a letter about June 22, saying that there was in the bank to her name $6,908. There has been evidence here tending to show that there was about $7,000 in the bank at that time to her name. It is for you to consider whether or not there was one entire contract to invest this whole amount of money, $8,500, on June 15, 1888. You have the testimony before you when those various investments were made, four different times during the year, in five different mortgages, and with reference to those mortgages and investments.

"Now if you shall find, on all this evidence, there was one entire contract made for the investment of the whole money, and that it was not to be completed until a date subsequent to May 18, 1889, — that there was nothing to be due to this plaintiff by reason of the action of the defendant until the entire completion of the contract (supposing he should make some denial with reference to the contract) and there would be nothing due to her until after May 18, 1889, which would make it within the six years previous to the time of bringing this suit, — then it would be your duty to find that the cause of action did not accrue until within the period of six years previous to the bringing of this suit."

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to be completed until after May 18, 1889, and under which nothing was to be due the plaintiff by reason of the action of the defendant until the entire completion of the contract, if he should make some denial with reference to the contract, as the jury were allowed to find by the instruction to which the defendant excepted.

At the outset the plaintiff, having a less sum in the bank than the whole amount dealt with in the supposed contract, was asked by the defendant if she did not wish to invest her money, and she replied that she did, and asked him to get for her some of the investments which he had described to her. When, from time to time after this interview, he notified her that he had securities for her, she gave him bank checks, sometimes for amounts larger than the face of the securities, until the whole face amount of the securities and of the bank checks was $8,500 on May 18, 1889. There is nothing that justifies a finding that it was agreed that the sum to be invested was $8,500, or any specified sum, nor any inference that the investments were not to be completed until after a specified date, nor that the defendant was not to be liable to her because of the first or any investment as soon as it was made, as fully as after the investment of all her money which might be invested by the defendant. Such a contract could hardly have been made under any circumstances or by any persons, and we find in the evidence nothing which should have permitted a finding that it was made here.

4. As the exceptions must be sustained for the reasons given, it is not necessary to deal very strictly with the portions of the charge which relate to the contention that no part of the plaintiff's damages was barred because the defendant had fraudulently concealed the cause of action from her knowledge.* We

* This portion of the charge was as follows:

"Evidence has been introduced tending to show that the defendant was acting as the fiduciary agent for the plaintiff. . . . If you find, on all the evidence, that he was acting as her fiduciary agent or confidential adviser in this transaction, and by reason of his misrepresentations her causes of action were concealed from her until some period subsequent to May 18, 1889, before she discovered that there had been anything wrong in connection with the investments, — if you find that this defendant concealed anything from her, and by reason of his representations in his fiduciary relation her cause of action was concealed from her before 1889, — then the period of six years

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understand that there was no evidence of any concealment of the cause of action by the defendant, except his failure to disclose from the outset certain matters which it was contended the relation in which he stood to the plaintiff made it his duty to disclose. If the contention had been that the defendant had done other acts for the purpose of concealing the cause of action, the instructions would have been faulty, perhaps, in allowing the jury to find that the statute was not a bar if knowledge of her cause of action was in fact concealed from her by reason of the defendant's acts, without proof that such acts were fraudulent. Taking the whole of this branch of the charge together, we think the jury understood that their finding upon this matter must be in favor of the defendant, unless they found that the defendant had fraudulently concealed from the plaintiff her cause of action.

Exceptions sustained.

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would not begin until the time when she discovered the act by any independent information she received that she had a cause of action against the defendant. . . .

"That is, if you find on all the evidence that, by reason of his statement acting as her agent, fiduciary agent, the cause of action was concealed from her until about the time she received notice of the default in payment of interest, say April 1st, 1890, and that she did not discover, or had no chance to discover, to that time, that she had a cause of action, then the statute of limitations would begin to run from that time. . . . Then the other considerations: whether or not, by reason of his being the fiduciary agent, the confidential adviser, and by reason of his being in the position of a trusted agent, the knowledge was concealed from her so that she did not know she had a cause of action until within the period of six years before bringing this action.

"If you find, on all the evidence, that the statute of limitations did begin to run from the date of each one of those transactions, that is, from June, 1888, from August, 1888, from January 26, 1889, and that nothing was concealed from her by reason of the acts of the defendant, it would be your duty to bring in a verdict for the defendant, with reference to those three transactions."

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HAMILTON L. HEYWARD *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Hampden. September 28, 1897. — November 23, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Railroad — Negligence — Action.

A person in charge of a horse which is being transported over a railroad, who is riding, according to custom, in the caboose at the end of a freight train, and who is familiar with the motion of such trains, and who, having been told by a brakeman as the train came to a stop that it had reached the place where he wanted to alight, is injured, while walking near the middle of the caboose towards the door without having hold of anything, by a sudden and unexpected movement of the car throwing him down, cannot maintain an action against the railroad corporation for his injury.

TORT, for personal injuries occasioned to the plaintiff, by the alleged negligence of the defendant, while transporting a horse from Boston to Springfield over the defendant's railroad. The plaintiff's specifications of negligence alleged "that said train was stopped and started in so sudden and violent a manner that the plaintiff was thrown over against a certain seat in the caboose in which he was riding at the time, with great force and violence."

Trial in the Superior Court, before *Dewey*, J., who reported the case for the determination of this court, in substance as follows.

The plaintiff testified that he was seventy years old and lived in Springfield; that in January, 1896, he had occasion to go to Boston to get a horse for one Harris; that he brought the horse to the defendant's yard in Boston and led him into a car; that the horse was put into a house car, and he got into the car with the horse; that the train left Boston at half past eleven o'clock in the forenoon; that when the train was at a standstill about one half or two thirds of the distance between Boston and Worcester, the conductor asked him why he was riding in the car with the horse, and told him that it was too cold to ride there, and to get out and go back and get into the caboose, which he did; that

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the caboose had seats on each side, a stove, and a desk; that after he got into the caboose the train started; that he thought the train reached the lower end of the yard at Worcester about five o'clock in the afternoon; that he asked the rear end brakeman how near the despatcher's office they stopped, and he said, "Why, do you want to go in there?" and the plaintiff replied, "Yes"; that the brakeman said, "Sometimes they stop right close to it, and sometimes down this side of it"; that the train stopped, and he got up and started to go out, when the brakeman said, "You don't want to get out here, for we are away to the lower end of the yard, — you sit down, and they will pull us up in a few minutes"; that the train started soon and went a little ways and stopped, and the plaintiff started to get out, when the brakeman said, "Sit still, I will tell you when it is time to get out"; that the plaintiff sat down again, and the train started and went a short distance further and then stopped, and the brakeman said, "Here is where you want to get out"; that the train was then at a standstill, and the plaintiff got up to go out; that he had been sitting on the seat that runs along the side of the car some five or six feet from the rear door; that he had got almost to the door, when there came a sudden jerk, and he was thrown off his feet and over backwards and sideways; and that he struck on the edge of the seat on the opposite side of the car, between the desk and the stove, and fell to the floor, receiving the injuries complained of.

On cross-examination the plaintiff testified that, before the time of his injury, he had accompanied horses on railroads upon a good many occasions; that he had been over the defendant's railroad with horses several times, and had ridden in the caboose before; that on the occasion of his injury the train made various stops between Boston and Worcester, and at various places cars were taken off and on, and the train stopped and switched; that he noticed a jolt on these occasions; that when the accident occurred he was walking near the middle of the caboose towards the door, without having hold of anything; and that, when he made the contract for the transportation of the horse, he paid six dollars and signed a paper, which was put in evidence and contained the following:

"Boston and Albany Railroad Company. Uniform Live Stock

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Contract. Boston Station, Jan. 4, 1896. This Agreement, made this 4th day of January, 1896, by and between the Boston and Albany Railroad Company, hereinafter called the carrier, and . . . hereinafter called the shipper, Witnesseth: That the said shipper has delivered to the said carrier Live Stock of the kind and number, and consigned and destined by said shipper as follows: One (1) Horse. H. H. Harris, Springfield, Mass. . . .

"That whenever the person or persons accompanying said stock under this contract to take care of the same shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract. . . .

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock I am in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities, and demands of every kind, nature, and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers, or any of its or their employees or otherwise."

At the close of the plaintiff's evidence, the judge, at the request of the defendant, directed the jury to return a verdict for the defendant. If, upon the evidence, the case should have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of $350; if the ruling was correct, the verdict was to stand.

J. B. Carroll, (*W. H. McClintock* with him,) for the plaintiff.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

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KNOWLTON, J. The contract between the plaintiff and the defendant was made upon the assumption that the plaintiff, or some one employed by him, was to go upon the train to take care of the horse, and the price paid for the transportation was paid for the carriage of the attendant as well as for that of the horse. *New York Central Railroad* v. *Lockwood*, 17 Wall. 357. The case differs materially from *Quimby* v. *Boston & Maine Railroad*, 150 Mass. 365, where the plaintiff was being carried gratuitously, and from *Hosmer* v. *Old Colony Railroad*, 156 Mass. 506, where the plaintiff was not in the relation of a passenger, but rather of one who had contracted for the privilege of carrying on a business for his own profit on the defendant's train.

If we assume in favor of the plaintiff that the contract was void as against public policy in that part which purported to exempt the defendant from liability for the negligence of its servants, (see *Doyle* v. *Fitchburg Railroad*, 166 Mass. 492, and *New York Central Railroad* v. *Lockwood*, 17 Wall. 357,) we come to the question whether there was any evidence of negligence on the part of the defendant. The plaintiff by his contract was not to ride upon a train adapted to the carrying of passengers. The writing signed by him contained this provision: "That whenever the person or persons accompanying said stock under this contract to take care of the same shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract." From the nature of the transaction, as well as from the express terms of the writing, the plaintiff well knew that the defendant was to run its train as freight trains usually are run, and that there would be many risks in going upon it to which persons on passenger trains are not exposed. He had often accompanied horses on freight trains, and he knew the usual movements of freight trains at stations, in stopping and starting, and in switching and taking on and leaving off cars.

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He knew that there is often quite a jolt, in connection with stopping or starting, to one upon the rear car of a long freight train. He testified that he had experience of frequent stopping and starting on this trip before he reached Worcester. So far as this was reasonably incident to the running of the train, he took the risk of it when he made his contract. The defendant did not undertake to manage its train with unusual care because he was upon it.

We see no evidence that the defendant's servants did anything for which they were culpable. When the plaintiff was about to get off the train a long way east of the station in Worcester, the brakeman very properly told him that that was not the place where he wanted to get off, and when the train had started and stopped again he repeated the warning. Afterwards he told him that they had reached the place where he wanted to alight. In giving him this information, he did not intimate that the train would wait there for the convenience of passengers. The plaintiff had reason to know that the brakeman had not communicated with the engineer or conductor in regard to any special mode of managing the train for the plaintiff's safety or convenience, and that the train was liable to be started in either direction at any moment. There was no negligence on the part of the brakeman in telling the plaintiff that they had reached the place where he wanted to alight, inasmuch as it was fairly implied that the plaintiff was to look out for his own safety in attempting to alight.

Nor is there any evidence of negligence on the part of the engineer or conductor in moving the train at that point, for there is nothing to show that either of them was aware that the movement would be attended with any special risk to the plaintiff. Indeed, the plaintiff, in his specification of the negligence relied on, which is made a part of the pleadings, does not allege any negligence in this particular, but charges as the only negligence relied upon that the train was stopped and started in a sudden and violent manner. To support this allegation there is nothing but his own testimony that he was seventy years of age, and that as he was walking near the middle of the caboose, without having either of his hands upon anything, an unexpected and sudden movement of the car threw him down. In this fact alone

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we do not discover any evidence that the movement was different from that which often occurs at the end of a long freight train, without the fault of the engineer or conductor.

We are of opinion that there was no evidence of negligence on the part of the defendant. *Judgment on the verdict.*

BRYAN GILMORE *vs.* MITTINEAGUE PAPER COMPANY.

Hampden. September 29, 1897. — November 23, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence — Evidence.

At the trial of an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the starting of the power by which a machine was run, while the plaintiff, who was familiar with the machine, was inside of it making an examination after a fire had been discovered in it, the evidence showed that a woman who was running the machine when the fire broke out gave the alarm by running part way to the superintendent's desk, which was in the room, without first shifting the belt from a tight pulley to a loose pulley on the overhead shaft; that she often shifted the belt in running the machine, and was perfectly competent to do so; and that the superintendent shut off the power from the room, and then started it again without knowing the plaintiff's position. *Held*, that there was no evidence that the defendant was negligent in employing an incompetent servant.

In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the starting of the power by which a machine was run, while the plaintiff was examining it after a fire had been discovered in it, a question to a witness, who was running the machine at the time of the fire, whether she had ever been instructed concerning the running of it, is rightly excluded, if there is nothing to show that she needed any instructions for the proper performance of her regular duties.

An employer is not called upon to instruct his ordinary employees in regard to their conduct in so unexpected an emergency as the discovery of a fire.

The admissions of the general manager and treasurer of a corporation, not made in the performance of his duty as such officer, are incompetent in an action against the corporation for personal injuries received by an employee.

In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the starting of the power by which a machine was run, while the plaintiff was examining it after a fire had been discovered in it, an offer to show that turning on or shutting off the power was an act of superintendence under the employers' liability act, St. 1887, c. 270, is rightly excluded, it appear-

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ing that, at the time of the accident, the witness called to prove it had worked in the room only one day, and did not know the defendant's custom and method of business in this particular.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ. The declaration contained three counts; the first at common law, for negligent failure to furnish the plaintiff with safe instrumentalities for the proper prosecution of his work, and with competent fellow servants; and the second and third counts, under the employers' liability act, St. 1887, c. 270, alleging a defect in the defendant's ways, works, or machinery, and negligence of a person intrusted with and exercising superintendence in the defendant's service, whose sole or principal duty was that of superintendence.

Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff had been employed by the defendant about sixteen months prior to the accident, which happened on October 12, 1895. From February, 1895, until the day of the accident, he had been engaged in running a threshing machine, which is a machine to dust rags in the process of paper making. This machine consisted of a wooden box about ten feet long, five feet wide, and seven or eight feet high, with a screen in the top, and a fan above that to carry off the dust. A cylinder about eight feet long and twenty-four inches in diameter revolved lengthwise in the machine; and upon the cylinder were two long rows of iron spikes from six to eight inches in length, used for catching and whirling rags. There was a horizontal opening about twenty-five inches wide, extending the whole length of the machine, covered by a sliding door. At the right end of the machine were two large iron pulleys about thirty-six inches in diameter, one loose and one tight, connected with the axle of the cylinder. Directly overhead were corresponding pulleys of like diameter upon the main shaft, connected by belt and shipper. At the left end of the machine was the wheel in the floor which started the entire power in the room. On the day in question, the plaintiff was sent to work in another part of the defendant's mill, called the stock house, and in his absence one Fannie Duval, a regular hand in that room, was running the machine, as she often did when directed to do so. During the forenoon,

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fire was discovered in the machine; and Duval gave the alarm by running part way to the desk of the superintendent, which was in the room. Thayer, the superintendent, at once shut off the speed from the room, and turned on the steam to smother the fire, and then sent a girl to call the men, including the plaintiff, who were working in the stock house. When they came, a hand hose was procured and run into the machine, and the fire extinguished. Thayer then directed the plaintiff to see if there was any fire in the screen in the upper part of the machine. The plaintiff testified that Thayer told him to "go right into the thresher, pull down the screen and examine it, and see if there was any fire, and clean it out." Several of the plaintiff's witnesses testified that he was directed to go into the machine. Thayer testified that the plaintiff could have examined the screen "while standing on his feet, without any necessity of getting into the machine." The plaintiff went into the machine, and while there Thayer started the speed in order to drive the fan which would take out of the room the steam and smoke, which had become uncomfortably dense; and the cylinder in the machine started, and the plaintiff received the injuries complained of. Thayer testified that he told Duval, when she gave the alarm of fire, to shift the belt from the tight pulley to the loose pulley; and that he had no knowledge or idea that the plaintiff had gone into the machine when he started the speed after the fire. There was uncontradicted evidence that Duval frequently shifted the belt when running the machine, and was competent to do so. Thayer also testified that, if the speed was shut down, it would not be possible for a woman to shift the belt from the tight pulley to the loose pulley.

Duval was asked the following questions: "Whether or not Mr. Thayer ever instructed you concerning the running of the duster, or what to do in case of fire? Did you receive instructions from any one in the mill as to what action should be taken by you in case of fire in that duster?" These questions were objected to and excluded; and the plaintiff excepted.

Horace A. Moses, called as a witness by the plaintiff, testified that he was the treasurer and manager of the defendant corporation; and that he had entire charge of the mill, and gave orders to the superintendents of the different departments of

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the mill. He was then asked the following question: "As a matter of fact, did you delegate to Mr. Thayer the power of hiring and discharging the men in that room, and instructing them?" This question was objected to, and excluded; and the plaintiff excepted.

The following questions were also asked Duval: "Whether or not Mr. Moses, the treasurer of the mill, ever told Mr. Thayer in your presence that it was n't a woman's work to run the thresher? Whether or not Mr. Moses said to Mr. Thayer, in your hearing, that it was n't a woman's work to run the duster, and that a man should be there?" Upon objection by the defendant, these questions were excluded; and the plaintiff excepted.

Thayer, who was a witness for the defendant, was asked: "I want to ask you if you had a conversation with Mr. Moses, in the presence of Fannie Duval, in which Mr. Moses said it was n't a woman's work to run the thresher?" This question, upon objection, was also excluded; and the plaintiff excepted.

John Farrell, called as a witness by the plaintiff, testified: "At the time of the accident I was employed in the rag room of the defendant, and was one of the men in the stock house; had been working for the defendant from the day before; one of the girls holloed 'Fire!' and we all ran into the rag room; I don't know whether the speed was running, and did n't notice whether it was shut down. When I came into the rag room, Mr. Thayer was standing towards the end of the thresher, where the wheel is. I noticed a few sparks of fire in the duster; stood there a while; I helped pull out the burning dust from under the thresher; I heard Mr. Thayer tell the plaintiff to go in the duster, and look overhead, and see if there was any fire. The plaintiff went in the duster, and the next thing I saw he was about ten feet away from the duster, on the floor. I saw Mr. Thayer start the speed; I don't know who shut it down. I saw Mr. Thayer start the speed while the plaintiff was in the duster." The plaintiff offered to show by this witness that starting the power or shutting it off was the sole act of the superintendent, and could not be performed by any one else in the room unless delegated by the superintendent; and that those acts were acts of superintendence, although in the nature

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of manual labor. This evidence was excluded, partly because the witness was not sufficiently informed as to the custom of the room, having worked there only one day; and the plaintiff excepted.

The judge ruled that there was no evidence for the jury to consider under the first and second counts of the declaration, and submitted the case to them upon the third count only; and the plaintiff excepted.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. G. McKechnie & J. L. Doherty, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

KNOWLTON, J. The first exception is to the ruling that there was no evidence for the jury under the first and second counts of the declaration.

1. It is very clear that there was no evidence under the second count, alleging the existence of a defect in the ways, works, or machinery of the defendant, and the exception to this part of the ruling has not been argued.

2. The only contention of the plaintiff in regard to the first count, which is at common law, is that the jury might have found the defendant to have been negligent in employing Fannie Duval, an incompetent servant. But there was no evidence that she was incompetent. Her only connection with the accident was through her failure to shift the belt from the tight pulley to the loose pulley, and so to stop the threshing machine, when she discovered the fire, and before the superintendent had time to stop it by shutting off the power from the room. There is nothing to indicate that she did not thoroughly understand the management of the machine and was not perfectly competent to run it from time to time, as she was directed to do. When she saw the fire she quickly gave the alarm, as any one would, running part way to the desk of the superintendent, which was in the room. If her doing this without first stopping the machine, or if her failure to shift the belt and stop the machine afterwards, before the superintendent could shut off the power from the room, be deemed negligence, it was negligence of a fellow servant of the plaintiff, for which the defendant is not liable, and it has no tendency to show that she was an incompetent

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servant. There was uncontradicted evidence that she often shifted the belt in running the machine, and was perfectly competent to do so; that she had not strength to shift the belt after the machine was stopped until the power was turned on, was immaterial. If the superintendent had noticed that the belt was on the tight pulley after the machine was stopped, he would not have turned on the power while the plaintiff was in the machine; and if the plaintiff had noticed it, he probably would not have entered the machine, at least without becoming certain that the power would not be turned on.

3. The evidence in regard to instructions to Fannie Duval was rightly excluded. There is nothing to show that she needed any instructions for the proper performance of her regular duties, and the defendant was not called upon to instruct its ordinary employees in regard to their conduct in so unexpected an emergency as the discovery of a fire.

The admissions of Moses, who was the general manager and treasurer of the defendant, not made in the performance of his duty as such treasurer, were incompetent. *Richstain* v. *Washington Mills Co.* 157 Mass. 538. *Wellington* v. *Boston & Maine Railroad,* 158 Mass. 185. *Toy* v. *United States Cartridge Co.* 159 Mass. 313.

The offer of Farrell's testimony, that turning on or shutting off the power was an act of superintendence, was rightly rejected. Apart from other reasons for the ruling, it is enough to justify it that the witness at the time of the accident had worked in the room only one day, and did not know the defendant's custom and method of business in this particular.

Exceptions overruled.

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BOHN MANUFACTURING COMPANY *vs.* WILLIAM H. SAWYER.

Worcester. October 4, 5, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Contract — Fire Insurance — Insurable Interest — Evidence — Exceptions.

The vendee of goods has an insurable interest therein, although the title remains in the vendor until delivery.

If, after a proposal by A. to B., the latter's silence in respect thereto and his subsequent letters and conduct warrant the inference, in an action upon the alleged contract, that he assented to the proposal, and the jury find that such is the fair import of his correspondence and acts, or that A. believed and had reason to believe that B. did assent to it, his secret intention not to do so is immaterial.

No exception lies to the refusal to give instructions in the language requested, if they are given in substance and with a qualification which adds nothing that is injurious to the excepting party.

CONTRACT, to recover $603.34, one half the amount paid by the plaintiff for premiums on policies of insurance against loss by fire upon certain lumber. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that the plaintiff paid the sums of money for various policies of insurance upon the lumber, according to the account annexed to its declaration, all of the payments being made between April 22 and August 9, 1893, with the exception of one payment made on October 16, 1893; and that the plaintiff credited the defendant in the account with the items shown in its account annexed, being returned premiums on policies cancelled which had been issued upon the lumber.

There was no controversy as to the fact of the payment of the premiums by the plaintiff at the time stated in the account annexed to the declaration.

To show the liability of the defendant to pay one half of the premiums, the plaintiff offered the following evidence.

A letter, dated February 25, 1893, from the plaintiff to the defendant, containing the following: "We will sell you all our Plummer Mill run," at a price named, "on the following terms: Four months from the first day of each month for 70% of all

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the lumber put in pile during the previous month, and the remaining 30% 60 days from date of shipment; all the lumber to be shipped prior to November 1, 1893." The defendant accepted the proposition by telegram on March 14, 1893.

On March 27 the defendant wrote the plaintiff a letter which, after referring to the contract, contained the following: "I notice that the first of each month I am to advance 70 p. c. of the value of the lumber sawed the previous month. It does not state by whom estimated and value put upon same. Neither does it state whether the lumber is marked up to me, and if insured by you, and the loss to remain your own if burned before shipment. That has always been the custom with Michigan men, to keep the lumber insured until shipped at their risk. Suppose that would be the case with you."

On April 3 the plaintiff wrote the defendant a letter, which contained, among other things, the following: "As to the insurance, will say that this matter was not discussed at the time your" agent "was here, and in the absence of any agreement would suggest that we each stand one half the insurance, and on this understanding will have the insurance placed on the lumber and fully covered, and in issuing the policy will do so with the loss, if any, to be paid to you as your interest might appear. Upon receipt of your paper will mark the lumber as sold to you. Would thank you to execute your notes and send them to us on receipt."

On April 7, the defendant wrote the plaintiff a letter discussing in detail the quantity and sizes of the lumber, and containing the expression, "I will try to mail the notes to you to-morrow," but making no reference to insurance; and again on April 15, the defendant wrote the plaintiff in the same way, saying nothing about insurance.

On April 22, the plaintiff wrote the defendant a letter, enclosing eight of the policies of insurance and an account charging the defendant with one half of the premiums thereon; and on May 3 the plaintiff wrote the defendant another letter, enclosing two more policies, and asking a return of one of the policies sent on April 22.

On May 6, the defendant wrote the plaintiff, enclosing the policy asked for by the plaintiff, as follows: "I enclose here-

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with by request insurance policy cancelled by the Phœnix Insurance Company of London, and have substituted in its place those which you last sent, embracing insurance of $4,000."

On May 31, the plaintiff wrote the defendant, asking him to return two other policies on lumber, and on June 6, the defendant wrote the plaintiff, acknowledging receipt of the letter of May 31, and asking as follows: "Please advise if these policies have been recalled and others put in their place, or if not, the reason why you recall them"; to which the plaintiff duly replied on June 8.

On June 12, the defendant wrote the plaintiff as follows: "I enclose herewith the two policies which you required. Please return the two policies to take the place of these I now send." This letter contained the two policies.

On June 16, the plaintiff wrote the defendant, stating that the plaintiff held four new policies, aggregating $10,000, with loss payable to the defendant, and that one Crary, the agent, requested the plaintiff to hold them, as it was possible he might have to make some further exchanges.

On July 15, the plaintiff wrote the defendant, asking him to return two policies, and saying, "We have ordered other policies to take the place of these, which will be sent you in the course of a few days"; and later again wrote the defendant, enclosing nine policies aggregating $24,500.

On July 22, the defendant wrote the plaintiff, enclosing a policy, as requested in the letter of July 15, and saying as follows: "Please send me a policy to take its place, and also send me policies which Crary sent you June 16, aggregating $10,000. I would like them all together."

On September 12, 1893, the defendant sent the plaintiff a letter, complaining of the conduct of the latter in respect to the lumber and the shipping and quality of it, and containing the following: "I am also informed that the insurance policies are nearly all cancelled that are sent to me. If such is the case I wish other policies put on until the lumber is delivered, and forwarded to me."

On September 16, the defendant wrote the plaintiff another letter, complaining of the plaintiff's conduct in respect to the lumber, and containing the following: "I understand that fires

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are raging all through the woods, and lumber is liable to burn, and I also understand that you have cancelled the policies and made them over to Hyland. I want to know what you have done in this respect, and if any and how much is insured for my benefit. It is important that I know this at once, for I must be protected by insurance."

On June 12, 1894, the plaintiff drew on the defendant for the amount of the premiums charged to him in the account. The defendant refused to pay the draft, and claimed that he did not owe it. No letter or word was sent by the defendant refusing to pay, or claiming not to be liable, until after the final delivery of all the lumber.

The plaintiff called as a witness John A. Sceger, its vice-president, who testified that he had an interview with the defendant after the controversy had arisen, in which the defendant said that the amount of the charges for the insurance was correct; that he was not liable for and would not pay it; that the plaintiff's yard and mills were situated at Plummer, about one hundred and twenty miles from St. Paul, where the witness lived; that he went to the yard every month or six weeks; that he saw in the yard piles of lumber marked "W. H. S."; that the piles contained from fifteen to seventeen thousand five hundred feet each; that after April, 1893, he saw thirty to fifty piles that had been marked, and in May or June he saw a man marking piles, but could not tell how many; and that the plaintiff's yard was one and one half miles from the main line on the railroad, and a spur track owned by the railroad ran into the yard.

The lumber was all eventually shipped to the defendant, and the policies were all eventually cancelled.

The policies were all in the same form, and contained the following clause: "Does insure Bohn Manufacturing Company for one year . . . on lumber (lath and shingles, if any) owned by assured, or held in trust or on commission, or sold but not delivered, piled in yard." Each of the policies had a rider thereon in the following terms: "Loss, if any, under this policy payable to W. H. Sawyer, of Worcester, Mass., as his interest may appear."

The defendant, who was called as a witness by the plaintiff, was asked, on cross-examination, the following question: "I ask

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you whether by that letter or by any silence of yours you intended to agree to pay half the premiums on these policies?" The letter referred to was the letter of March 27, 1893.

The judge excluded this evidence; and the defendant excepted.

The defendant asked the judge to rule as follows:

"1. There is no sufficient evidence to warrant a verdict for the plaintiff.

"2. On the evidence in this case the property in the lumber did not pass to the defendant until on the cars at Plummer, as provided in the proposition contained in the letter of February 25, 1893, and if it had burned in the plaintiff's yard, or before so placed on the cars, the loss would have been the plaintiff's as between it and the defendant.

"3. Marking the piles of lumber, as testified to by Seeger, did not constitute a delivery under the contract disclosed by the evidence."

The judge declined to give the first ruling requested, and as to the second and third requests instructed the jury as follows:

"On the evidence in this case, provided you find the original contract not to have been changed, the property in the lumber did not pass to the defendant until on the cars at Plummer, as comprised in the proposition contained in the letter of February 25, 1895, and if it had been burned in the plaintiff's yard, or before it was placed on the cars, the loss would have been the plaintiff's as between it and the defendant. Marking the piles of lumber as testified to by Seeger did not constitute delivery under the contract as disclosed by the evidence, providing the contract remained the same as originally, without any change, and unless there was a specific contract between them that the title should so pass by the doing of that particular thing. The property was insured as the property of the plaintiff, and unless it was its property at the time it was insured it would not be valid, and the policy attached to the property only while it remained the property of the plaintiff."

The defendant excepted to the refusal to give the first ruling, and to the modification of the other rulings requested by him.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

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F. P. Goulding, (*W. C. Mellish* with him,) for the defendant.

C. M. Rice, (*H. W. King* with him,) for the plaintiff.

ALLEN, J. The defendant had an insurable interest in the lumber, although the title remained in the vendor till delivery. *Wainer* v. *Milford Ins. Co.* 153 Mass. 335, 341, 342. *Amsinck* v. *American Ins. Co.* 129 Mass. 185.

From the defendant's silence in respect to the plaintiff's proposal to effect insurance at their joint expense, and from his subsequent letters and conduct in respect to the policies, the jury might well infer that he assented to that proposal; and if the jury found that such was the fair import of his correspondence and acts, or that the plaintiff believed and had reason to believe that he did assent to it, his secret intention not to do so was immaterial. *Hobbs* v. *Massasoit Whip Co.* 158 Mass. 194. *West* v. *Platt*, 127 Mass. 367, 372.

The second and third rulings which were requested were given in substance. The qualification added nothing which was injurious to the defendant. *Exceptions overruled.*

MICHAEL BRODERICK *vs.* JAMES J. HIGGINSON.

CATHARINE BRODERICK *vs.* SAME.

Worcester. October 5, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Injuries occasioned by a Dog — Evidence — Instructions — Rights of Plaintiffs when Cases are tried together.

It is competent to prove that a dog has a habit of attacking passing teams, in support of a disputed allegation that he attacked a passing team on a particular occasion.

At the trial together of two actions of tort, brought one by the husband and the other by his wife, to recover damages for injuries occasioned by a dog, there was evidence of admissions made by the husband, but there was no evidence that the wife was present when they were made, or that she had made such admissions herself. The judge charged the jury that both cases were dependent on one state of facts, and the principles of law applicable to one were applicable to the other, and that, the cases being tried together, the rights of the wife were dependent entirely upon the rights of the husband, and the rights of the husband were dependent upon the rights of the wife; so that if one could prevail the

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other could prevail. The plaintiffs' counsel asked the judge to rule that "any admissions which the husband may have made not in the presence of his wife cannot affect her rights to maintain her action unless" they should "find such admissions were true"; and that "his evidence and admissions are to be treated the same as the evidence and admissions of any other witness in the case, so far as her rights are concerned." The judge refused so to rule. *Held*, that the ruling requested was correct, and that the ruling given was erroneous.

TWO ACTIONS OF TORT, to recover, under Pub. Sts. c. 102, § 93, double damages for injuries occasioned by a dog. At the trial in the Superior Court, before *Hopkins*, J., the defendant was charged as keeper of the dog, and the plaintiffs contended that the injury occurred because the dog rushed into the highway, frightened their horse, and caused both the plaintiffs, who were husband and wife, and who were riding together, to be thrown from their carriage.

The plaintiffs offered evidence tending to show that the dog had made other attacks upon other teams passing, in a like manner, and stated that the offer was made with a view to showing that the dog had made the attack in question. This evidence was excluded; and the plaintiffs excepted.

The defendant offered evidence tending to show that after the accident the husband said that it happened through the fault of the horse, and that the dog did not make an attack upon the horse, or any demonstration towards him; but there was no evidence that the wife was present when he so said, or that she had made such admissions.

The judge charged the jury that both cases were dependent on one state of facts, and the principles of law applicable to one were applicable to the other, and that, the cases being tried together, the rights of the wife were dependent entirely upon the rights of the husband, and the rights of the husband were likewise dependent upon the rights of the wife; so that if one could prevail the other could prevail.

The plaintiffs' counsel, at the conclusion of the instructions, asked the judge to rule that "any admissions which Mr. Broderick may have made not in the presence of Mrs. Broderick cannot affect her rights to maintain her action unless you find such admissions were true. His evidence and admissions are to be treated the same as the evidence and admissions of any other witness in the case, so far as her rights are concerned."

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The judge refused so to rule, and the plaintiffs excepted to so much of the charge as related to the wife's right to maintain her action, and to the refusal of the judge to give the instructions requested.

The jury returned a verdict for the defendant in each case; and the plaintiffs alleged exceptions.

B. W. Potter, for the plaintiffs.

W. S. B. Hopkins, (*F. B. Smith & W. S. B. Hopkins, Jr.*, with him,) for the defendant.

KNOWLTON, J. A question common to both of these cases is, whether it is competent to prove that a dog has a habit of attacking passing teams, in support of a disputed allegation that he attacked a passing team on a particular occasion.

It is a familiar fact that animals are more likely to act in a certain way at a particular time, if the action is in accordance with their established habit or usual conduct, than if it is not. There is a probability that an animal will act as he is accustomed to act under like circumstances. For this reason, when disputes have arisen in regard to the conduct of an animal, evidence of his habits in that particular has often been received. *Todd* v. *Rowley*, 8 Allen, 51, 58. *Maggi* v. *Cutts*, 123 Mass. 535, 537. *Lynch* v. *Moore*, 154 Mass. 335. These cases fully cover the question now presented. They are authorities not only to the proposition that evidence of habit may be received in such cases, but that habits may be proved by evidence of the frequent observation of particular instances. Of similar import, although somewhat different in the application of the principle, are the later cases of *Bemis* v. *Temple*, 162 Mass. 342, and *Shea* v. *Glendale Elastic Fabrics Co.* 162 Mass. 463. We are of opinion that the evidence should have been admitted.

The other question arises only in the case of the female plaintiff. The liability of the defendant in the two cases depends upon the same facts, and it would seem anomalous that a verdict should be rendered in his favor in one case and against him in the other. But to prove facts relied on by him the admission of the husband was competent in the husband's case, and not in the wife's. If her case was being tried alone, it is clear that her husband's admissions would not be competent. They were not made competent against her by the fact that for convenience

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his case was being tried at the same time with hers. It was the duty of the presiding judge to instruct the jury that these admissions might be considered in his case, but not in hers. Sometimes the risk that a party who has made no admissions may be prejudiced by the admissions of another party whose rights or liabilities depend on the same facts, is so great that a court will order separate trials, when otherwise their cases would be tried together. When cases of this kind are tried together the jury should be properly instructed, so that the rules of evidence may be applied for and against each party as if but one case was on trial. The instructions requested upon this part of the case were correct, and the instructions given were erroneous.

Exceptions sustained.

VINIA G. GREEN *vs.* E. D. SMITH & others.

Worcester. October 6, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Loss of Life — Employers' Liability Act — Negligence of Superintendent — Death without Conscious Suffering — Law and Fact.

In an action under the employers' liability act, St. 1887, c. 270, for causing the death of A., who was killed by an explosion of dynamite in a tunnel where he was at work, it appeared that, after a blast had been exploded in the tunnel, the defendant's workmen, including A. and the person who was in superintendence of the work, returned down the shaft to the tunnel, carrying dynamite with them. The only survivor of the explosion which killed A. testified that, as soon as they reached the tunnel, the superintendent told the witness to go and get the loading stick, which he did, and gave it to another workman, near whom the superintendent was standing; that A. was making connection with wires on the other side of the tunnel and in front of the superintendent; that the witness saw the dynamite placed in the holes, after which the superintendent gave them orders to go after the main wire; that the witness had gone fifteen or twenty feet when the explosion occurred; and that this was from ten to fifteen minutes after they started down the shaft. An expert witness testified that an explosion of dynamite in a hole drilled in a rock heated the rock; that it was dangerous to place dynamite in a rock which was so heated; and that, in his opinion, the second explosion was caused by the heated holes. *Held*, that it was for the jury to determine whether the superintendent was exercising superintendence.

In an action under the employers' liability act, St. 1887, c. 270, for causing the death of A., who was killed by an explosion of dynamite in a tunnel where he

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was at work, two witnesses who saw A. just after the explosion testified that his leg was broken and his body was badly cut and bruised, but they did not notice whether or not he was breathing. Of three physicians, to whom hypothetical questions were put, one answered that he should say that A. died without conscious suffering, basing his opinion upon the force of the explosion; and the other two answered that they could not say whether or not A. died without conscious suffering, but on cross-examination stated that it was possible that he died instantly. One witness for the defendant, who saw A. soon after the explosion, testified that A. was laid on a pile of lumber and groaned very plainly, but did not speak, and seemed to be suffering, and he should say that he lived about twenty minutes; and another, who drove an ambulance in which A. was placed, testified that he knew A. "was alive and groaning," and, on cross-examination, that he could hear him breathing, but did not hear him say anything. *Held*, that there was evidence from which the jury might infer that A. died without conscious suffering.

TORT, under the employers' liability act, St. 1887, c. 270, for causing the death of William Green, who was the plaintiff's husband. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

Green was in the employ of the defendants, and was engaged as a laborer in the construction of a tunnel at West Berlin. This tunnel was constructed through solid rock, and was a part of a series of tunnels which the defendants were building for the Metropolitan Water Board. The tunnel was reached by a shaft sunk into the earth one hundred and twenty-seven feet, and the head of the tunnel in which the accident occurred was distant about one hundred and fifty feet from the shaft. The plan of operations was to sink a shaft the requisite depth, and then start tunnels in either direction from the bottom of the shaft. These tunnels had a flat floor and an arched roof, and were constructed by first blowing out by means of dynamite the upper half of the tunnel, leaving the lower part unblasted. The top of the tunnel, including the arch first blown out, was called the heading. The lower part of the tunnel, left unblasted until a later time, was known as the bench. The men worked in the daytime drilling holes with compressed air drills, and the blasts were made at the end of the day's work. On the day of the accident, the men, including Green, had been engaged in drilling holes for blasting into the heading. One blast had already been exploded. When a blast was exploded the men were obliged to go to the top of the shaft until after the blast. In this case, after the explosion, the men, accompanied by one Kelley, who from the evidence shown

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was a foreman and in superintendence of the work, so as to make him a superintendent under the employers' liability act, returned down the shaft to the tunnel. Of the men engaged in work in the heading where the explosion occurred, only one, Thomas Foley, survived the explosion. His evidence, being the only evidence in regard to how the accident occurred, was as follows:

"We went down right soon as he pulled the battery; the foreman hollered to get into the cage and go down. The men got into the cage and we did go down. It did not take us more than four or five minutes to go down. I was a little later than the other men in getting into the heading. The first thing that happened after I got into the heading was that Kelley told me to go and get the loading stick, and he said there was one bottom hole down in the heading on the right hand side, and I went in and got the loading stick and gave it to Perry. Kelley was there; he was standing right in the heading at the left hand side near Perry. Green was making connection with wires on the other side of the heading and in front of Kelley. I saw the dynamite placed in those holes. The hole looked as though a part of it was broken off on one side. The dynamite was put in the back part of the hole. There was a cap on the dynamite. After the dynamite was put in the holes we got orders to go after the main wire to the heading. The boss, Kelley, gave us these orders. I went after the main wire. I guess I went fifteen or twenty feet. This must have been some ten or twelve or fifteen minutes after we started down from the top. I picked up the wire and just held it in my hand and was going to make the connection with another piece of wire to this piece of main wires when the explosion occurred. I had a wire in my hand at the time the explosion occurred. I was going to put another piece of wire on to it to make it long enough to take it into the heading. It had not been connected with the main wire. Then the explosion occurred. I had got away fifteen or twenty feet from Green and Perry at the time of the explosion. It took me only as long as it would take to run that distance. Green was connecting up the wires when I saw him. As a result of the explosion Green was killed, and all except me."

On cross-examination, he testified: "The gang, when they went down into the tunnel at the time of the accident, carried

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some dynamite with them in their hands. Perry was carrying some. After I got the loading stick I gave it to Perry, and then I went back to fix the wires."

William Knowles, called as a witness by the plaintiff, testified that he was a sewer contractor; that for fifteen or sixteen years he had used dynamite in his business; and that his work was mostly making house connections. The judge ruled that the witness was competent to testify as an expert. He was then asked: "In your experience, what do you say, will dynamite explode from heat?" To which he answered: "Well, we never had any accident. If it was heated too hot it would explode, no doubt about that, though I never have seen it explode from heat." The rest of his evidence was to the effect that an explosion of dynamite in a hole drilled in a rock heated the rock; that it was dangerous to place dynamite in a rock which was so heated; and that, in his opinion, the second explosion was caused by the heated holes.

The evidence as to whether or not Green was instantly killed or died without conscious suffering was as follows.

Richard Miller, called as a witness by the plaintiff, testified that he was working in the other heading of this same tunnel; that he went down into the shaft with Green, and then went to work in the east heading; that Green and the others were working in the west heading; and that he heard the explosion. Being asked how soon he got in there, he said, "As soon as we could get into the cage and come up on top and see what caused the explosion." He further testified as follows: "We took a light and went down into the shaft and into the west heading. When we got into the west heading, we found four men blowed to the left hand side as you go in, partly covered with muck and stones. I saw Green. His leg was cut here [the witness indicating a point in the thigh, about half way above the knee] and broken, and his body was in pretty bad condition. I did not notice particularly whether he was breathing or not. I could not tell whether there were any signs of life. After we got to the top I saw Green. His leg was all torn to pieces. I did not examine him to see how he was, but I just merely looked at him. He did not seem to be very much hurt about the head. His body appeared to be cut up by stones."

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Henry Stanton, called as a witness by the plaintiff, testified that he was at work at the time of the accident for the defendants; that he knew Green and was one of the men who took him out; that he found Green lying on the left hand side covered with muck, meaning by muck stone and dirt; that he helped to carry him out; that he found his leg broken, and he was badly bruised about his body; that his face was not torn much; that he did not take any notice of his breathing; and that he did not hear him speak.

Lemuel F. Woodward, a physician, called as a witness by the plaintiff, was asked the following hypothetical question: "Suppose a man was found in a tunnel one hundred and twenty-seven feet underground, inside of ten or fifteen minutes after an explosion, covered with muck, which means stone and dirt and the débris after the explosion, that both his legs were broken, or, as one witness has put it, were shattered, cut in two places; some mentioned it, and, as one witness says, his body was full of holes, and another says badly bruised, and that there was no evidence that the man breathed or that he spoke, whether or not in your opinion the man died without conscious suffering." The witness answered that he should say that he died without conscious suffering. On cross-examination, he stated that his reason for giving this opinion was not so much the amount of muck that was on his body, but the force of the explosion; that the fact that Green was covered with muck and his body and legs shattered showed the force of the explosion; that he assumed that the man was killed by the force of the explosion; that he could not say he did not live, but that there was no conscious suffering; and that this man was evidently killed outright, and the others were injured and died.

Frederick H. Baker, a physician, called as a witness by the defendants, was asked the following hypothetical question: "Assuming that a man in a tunnel one hundred and twenty-seven feet underground is subjected to a blast of dynamite of great strength and force, that he is blown to one side of the tunnel, and that he is covered with muck which is rock blown out by the blast, that his body is badly bruised and that one or both legs are broken or shattered, as termed by one of the witnesses, that his head is not particularly bruised and that he is found

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ten or fifteen minutes after the explosion, and for the purpose of this question, assume he was not breathing, and life was extinct, can you say, what do you say as an expert whether or not he lived and consciously suffered during that ten or fifteen minutes?" To this he answered, "I cannot say whether he did or did not. It is possible he suffered, and it is possible he was killed outright." He was then asked, "Is it any more possible he was killed outright than that he would suffer?" and answered, "I do not see how that question can be settled positively. It is perfectly possible he suffered during that ten or fifteen minutes." And, on cross-examination, he said it was perfectly possible that he died instantly.

Warren R. Gilman, a practising physician, was asked the following hypothetical question: "Assume that a man in a tunnel one hundred and twenty-seven feet underground is subjected to an explosion of dynamite of great force, and that he is thrown to one side of the tunnel, and a quantity of muck or loose stone is thrown on him, and he is found ten or fifteen minutes after the accident, and that at that time he is found with this muck upon him, that one of his legs is broken or badly shattered, that his body is badly bruised, that, as one witness puts it, stone is blown into his body to some extent, and that he is not particularly injured about the head. Assume that state of facts and whether you would say as a medical expert that man suffered consciously or not during the ten or fifteen minutes before." He answered as follows: "I think it is impossible to say whether he suffered or whether he did not suffer." On cross-examination, being asked if it was quite possible that an explosion of that kind would cause or deprive him immediately of his senses and his consciousness, and that he would lie there without knowing anything for those fifteen minutes, he answered that it was possible. Being asked whether or not on the hypothetical question asked in the cross-examination it was not quite probable that the man did not suffer at all, he said, "I cannot say that."

James McAtee, called as a witness by the defendant, testified that at the time of the explosion he was in the other heading about forty feet from the shaft; that their lights were put out by the explosion; that they went on top, that is, up the shaft, and relighted their lamps; and that they then went down into

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the heading where the explosion occurred. He further testified as follows: "I saw Green when he was taken out. He was lying on the left hand side of the tunnel, partly covered up by muck. He was breathing. We took him on top, and laid him out on a pile of lumber. I should say that he lived about twenty minutes. He groaned very plainly, but he did not speak. He seemed to be suffering. It seemed as though he wanted something, and could not make us understand what he did want." On cross-examination, he testified that one of Green's legs, he did not remember which, was almost cut off and only hanging; that the other appeared to be all right; that his body must have been cut up, as his clothing was torn off; that it appeared as if stones had been driven into his body; that if holes were hot, water should be poured into the holes; and that dynamite is likely to explode from hot holes.

James F. Maher, called as a witness by the defendant, testified that, at the time of the accident, he drove the ambulance for the town of Clinton, and went to the shaft and saw Green there; that it might have been half an hour after the accident; and that he did not get off the seat of his ambulance, but he knew "he was alive and groaning." On cross-examination, he testified that he could hear him breathing, but did not hear him say anything; and that he took him to an undertaker's rooms, and he died on the way.

At the conclusion of the evidence, the defendants asked the judge to rule that, on all the evidence, the plaintiff was not entitled to recover; but the judge refused so to rule.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

F. B. Smith, (*W. S. B. Hopkins & W. S. B. Hopkins, Jr.* with him,) for the defendants.

C. C. Milton, (*H. Parker* with him,) for the plaintiff.

ALLEN, J. There was some evidence for the jury, that the defendants' superintendent, while exercising superintendence, directed dynamite to be put into a hole while the rock was heated from the effect of a recent explosion; that under such circumstances an explosion was likely or liable to occur; and that the explosion which followed and caused the death of the plaintiff's husband was the result of negligence on the part of

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the superintendent in thus directing the dynamite to be put in before the rock had become cool. Under the circumstances of the present case, it was for the jury to determine whether the superintendent was exercising superintendence; and in this respect the case is to be distinguished from *Whittaker* v. *Bent*, 167 Mass. 588.

There was also evidence from which the jury might infer that the plaintiff's husband died without conscious suffering. The small size of that portion of the tunnel where the accident occurred, the force of the explosion as shown by its effect, the proximity of the deceased, the distance to which he and the other men were thrown, and the injuries found upon his body, supplemented by the evidence of the doctors, might lead the jury to be reasonably satisfied that the deceased was at once deprived of consciousness, and that he did not regain it, even though he may have breathed and groaned afterwards. The testimony as to these last matters may not have been accepted by the jury as absolutely accurate. The way in which the deceased was cared for by those who were rendering assistance at the time might be thought to indicate that they saw in him no signs of consciousness.

We cannot say that there was no evidence for the jury on the above points; and the other objections taken by the defendants were not insisted on at the argument.

Exceptions overruled.

DENNIS J. HARRINGTON *vs.* CALLAHAN McCARTHY.

Worcester. October 6, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Equity — Injunction — Boundary — Decree for Removal of Parts of Building — Damages — Laches — Remedy at Law.

If B. constructs a wooden building with a cornice, which at the front corner of the building projects over A.'s land a distance of eighteen inches, some of the window sills also slightly projecting, and B. is under no mistake in regard to the boundary line, except as to whether the line at one end runs to the centre or to one side of a monument about four inches wide, and if when B. is putting in the foundation stones, A. calls his attention to his duty by telling him that he thinks

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the wall is over the line, A., having brought a bill in equity and given notice of its filing to B. before the house is completed, is entitled to an injunction against the maintenance of any part of the building over his land; and it is immaterial that A.'s land is used as a driveway, and that he has not suffered any actual damage in the use of his property; and the case shows no such laches as to deprive him of his remedy.

Where it was held that A. was entitled to an injunction against the maintenance of any part of B.'s wooden building over A.'s land, the court said, in view of the fact that the encroachment of B.'s foundation wall upon A.'s land was unintentional and very slight, that B. when he discovered it after the building was nearly completed, "offered to pay A. any sum he might claim," and A. refused to accept anything but removal, and in view of the further fact that the judge found that no appreciable damage resulted to A., while the removal of the projecting portions of the foundation stones might be difficult and expensive, that equity did not require it to order an injunction on this part of the case, and that A. was left to his remedy at law.

BILL IN EQUITY, filed August 29, 1896, praying that the respondent be enjoined from constructing and maintaining any part of a building over the plaintiff's land. In the Superior Court the bill was dismissed; and the plaintiff appealed to this court. The facts appear in the opinion.

G. S. Taft, for the plaintiff.

J. R. Thayer, (*A. P. Rugg* with him,) for the defendant.

KNOWLTON, J. This is a bill in equity to obtain a mandatory injunction against the maintenance by the defendant of a building over and upon the land of the plaintiff. The general principles applicable to cases of this kind have often been stated. The proposition relied on by the plaintiff appears in *Lynch* v. *Union Institution for Savings*, 159 Mass. 306, 308, in these words: "In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay the damages."

The defendant has constructed a wooden building with a cornice, which, at the front corner of the building, projects over the plaintiff's land a distance of eighteen inches. Some of the window sills project slightly over the plaintiff's land. He was under no mistake in regard to the boundary line, except as to the question whether the line at one end ran to the centre or to one side of a monument about four inches wide. When he

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was putting in the foundation stones the plaintiff called his attention to his duty by telling him that he thought the wall was over the line. The bill was brought and notice of its filing was given to him before the house was completed. In our opinion the case falls within a large number of decisions granting relief by injunction to plaintiffs whose rights have been encroached upon by erections placed upon their land without right. *Tucker* v. *Howard*, 128 Mass. 361. *Creely* v. *Bay State Brick Co.* 103 Mass. 514. *Cadigan* v. *Brown*, 120 Mass. 493. *Hodgkins* v. *Farrington*, 150 Mass. 19. *Lynch* v. *Union Institution for Savings*, 158 Mass. 394, and 159 Mass. 306. The case does not fall within any of the exceptions stated in the case last cited. See also *Brande* v. *Grace*, 154 Mass. 210; *Starkie* v. *Richmond*, 155 Mass. 188; *Methodist Episcopal Society* v. *Akers*, 167 Mass. 560.

The fact that the plaintiff's land is now used as a driveway does not affect his rights. He may at any time desire to erect a building upon it. Nor is it material that he has not yet suffered any actual damage in the use of his property. *Melrose* v. *Cutter*, 159 Mass. 461, 469. *Peck* v. *Conway*, 119 Mass. 546, 550. The maintenance of the defendant's building over his land would, by the lapse of time, ripen into an easement which might materially affect the value of his property if nothing were done to prevent it.

The case shows no such laches as to deprive the plaintiff of his remedy. *Linzee* v. *Mixer*, 101 Mass. 512, 528. *Attorney General* v. *Algonquin Club*, 153 Mass. 447, 453. He called the defendant's attention to his rights before the foundation wall had been completed, and the defendant could hardly have failed to know that his cornice would extend over the plaintiff's land. The building is constructed of wood, and the projecting portions can easily be removed without substantial injury to the rest of the structure. We are of opinion that the plaintiff is entitled to an injunction against the maintenance of any part of the wooden building over his land.

The case shows that, while the foundation wall is in the main upon the defendant's land, an occasional stone projects a short distance into the plaintiff's land below the surface of the ground. It appears that the defendant told the contractor who was building the wall of the plaintiff's statements in regard to it, and

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directed him to be sure not to go over the line as run by the surveyor, and believed he did not go over it. In view of the fact that the encroachment in this particular was unintentional and very slight, that the defendant, when he discovered it after the building was nearly completed, "offered to pay the plaintiff any sum he might claim," and the plaintiff refused to accept anything but removal; and in view of the further fact that the judge found that no appreciable damage resulted to the plaintiff, while it seems that the removal of the projecting portions of these stones might be difficult and expensive, we are of opinion that equity does not require us to order an injunction on this part of the case. As to this, the plaintiff is left to his remedy at law. *Lynch* v. *Union Institution for Savings*, 159 Mass. 306. *Methodist Episcopal Society* v. *Akers*, 167 Mass. 560.

So ordered.

SELECTMEN OF WESTBOROUGH & another, petitioners.

Suffolk. October 6, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, KNOWLTON, & MORTON, JJ.

Abolition of Highway and Railroad Crossings at Grade — Confirmation of Report of Commissioners — Relocation of Railroad Tracks — Change of Position of Railroad Station — Cost of Abolishing Grade Crossing — Discontinuance of Way — Bridges — Extent of Grading.

The objection that the alteration proposed by commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, is in effect a relocation of a considerable extent of the railroad company's tracks, and is more extensive than is warranted by law, cannot prevail, if the alteration, though extensive, appears to be in substance what was contemplated in the original petition, and the court has nothing before it which enables it to see that the purpose could be accomplished in any better or cheaper way.

An alteration proposed by commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, may include a change in the position of a railroad station.

Commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, are not required to prescribe in their report a manner of determining the actual cost of abolishing the grade crossing.

Commissioners appointed under St. 1890, c. 428, upon a petition for the abolition

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of the crossing at grade of a highway by a railroad, may discontinue so much of public ways as is contained within the land taken for the new location of the railroad.

It cannot be said that the report of commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, does not specify the general manner of construction, or prescribe the manner or limits within which the alterations shall be made, in such manner as the law requires, and that it is vague and indefinite as to bridges, and as to extent of grading, if the report calls for three bridges all to be "suitable" and provides the details for their construction, and no particulars are pointed out in respect to which the specifications as to the extent of grading are deemed insufficient, such specifications appearing to the court to be full and precise.

PETITION, under St. 1890, c. 428, by the Selectmen of the town of Westborough and the Directors of the Boston and Albany Railroad Company, for the abolition of certain grade crossings in said town. Hearing in the Superior Court, before *Richardson*, J., who reported the case for the determination of this court. The facts appear in the opinion, and in a note of the reporter thereto.

Samuel Hoar, for the Boston and Albany Railroad Company.

W. S. B. Hopkins, (*E. C. Bates* with him,) for the Selectmen of Westborough.

F. T. Hammond, Assistant Attorney General, for the Commonwealth.

ALLEN, J. This was a joint petition of the Selectmen of Westborough and the Directors of the Boston and Albany Railroad Company, brought under the provisions of St. 1890, c. 428, to bring about the abolition of certain grade crossings in Westborough. It may be that, strictly speaking, the selectmen in joining in this petition did not act as agents of the town. But due notice was given to the town and to the Commonwealth, and after the return day of the notice, the Commonwealth, the selectmen, and the directors agreed upon three persons as commissioners, who were accordingly appointed. Public hearings were held from time to time in Westborough, and after the lapse of several months the commissioners filed their report. At the hearing upon the report, which was eighteen months after the filing thereof, the town of Westborough, and the selectmen who were then in office, (who were not the same persons as those who brought the petition,) filed objections to the confirmation of

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the report. At the hearing upon these objections, no evidence other than the decision of the commissioners, and the plan which was filed as a part thereof, was offered to the court.

So far as appears, at the hearings before the commissioners no objection was raised by the town to the changes prayed for in the petition; and these, so far as we can see, were in substantial accordance with those reported by the commissioners. There is no suggestion that the commissioners acted in bad faith, and no imputation upon their fairness or impartiality is made. No scheme or plan of alterations was laid before the court by which the substantial results desired could be accomplished in a better way, or at less cost. Nor in the argument before us is it pointed out how a less extensive change would carry out the purpose in view.

The first objection insisted on at the argument before us is that the proposed alteration is in effect a relocation of a considerable extent of the railroad company's tracks, and is more extensive than is warranted by law. The statute clearly contemplates some alteration in the location of a railroad, in order to carry out the purpose in view, which is to promote the abolition of grade crossings; but it does not attempt to define the extent to which such alteration may be carried. In a case arising under a statute authorizing county commissioners to make alterations in the location of a railroad or of a highway or town way, in order to do away with grade crossings, the difficulty of defining the limits of such changes as were authorized was recognized, and it was said, in general terms, that under the guise of doing away with a crossing at grade the authority of the commissioners would not extend further than to do what is reasonably necessary to accomplish the purpose, in view of the situation of the ground, and of other circumstances. *Davis* v. *County Commissioners*, 153 Mass. 218. In the present case, the alteration, though extensive, appears to be in substance what was contemplated in the original petition, and we have nothing before us which enables us to see that the purpose could be accomplished in any better or cheaper way. A reasonable presumption must be made in favor of the plan and result arrived at by the commissioners. This objection therefore cannot prevail. See *Cambridge* v. *County Commissioners*, 167 Mass. 137;

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Old Colony Railroad, petitioner, 163 Mass. 356; *Norwood* v. *New York & New England Railroad*, 161 Mass. 259.

The next objection is that the report involves a substantial alteration in the location of the railroad station in Westborough. According to the petition and the report of the commissioners, the change of location would remove the railroad track from the station, and the position of the station would naturally and necessarily be changed, as an incident of the change of the location of the track. The authority conferred by the statute to make changes of location is not limited to changes which will not affect stations. The fact that the station as well as the track is changed furnishes no reason for declaring the changes invalid in law.

It is further objected that the report of the commissioners prescribes no manner of determining the actual cost of abolishing the grade crossing. But the statute does not require this to be done. The commissioners are to determine which party shall do the work, or apportion the work between the railroad company and the city or town; and after deducting the percentage of the actual cost which the railroad company is to pay, they are to apportion the remainder of the cost, under a certain limitation, between the Commonwealth and the city or town. St. 1890, c. 428, § 3. They are not required to ascertain or estimate the actual cost, or to prescribe any manner in which this shall be done.

The town also contends that the statute does not authorize the discontinuance or obstruction of portions of High, Summer, Water, or Willow Streets. Section 4 of the act provides that, if the commission decide that any portion of an existing public way should be discontinued, it shall so specify, and it shall further specify what land or other property it deems necessary to be taken. The report of the commissioners specified in detail the land taken for the new location of the railroad, and added "So much of said Willow, High, Water, and Summer Streets is hereby discontinued as lies within the parcel of land hereinbefore taken for the new location of the railroad." Such discontinuance was within the authority conferred by the statute.

Finally, it is urged that the report of the commissioners does not specify the general manner of construction, or prescribe the

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manner or limits within which such alterations shall be made, in such manner as the law requires; and that it is vague and indefinite as to bridges, and as to extent of grading. The report calls for three bridges, namely, a railroad bridge over East Main Street, a bridge for a private way over the railroad track, and a bridge for Milk Street over the railroad track. These are all to be "suitable" bridges, (see *Worcester* v. *Railroad Commissioners*, 113 Mass. 170, 171,) which means that they shall have relation to what is usual, and is ordinarily deemed necessary, under similar circumstances; and details for their construction are given, which are to be taken in connection with the general requirement that the bridges shall be suitable. Looking at all of these specifications, we cannot see that they are open to criticism as vague and indefinite. And the specifications as to the extent of grading appear to us to be sufficiently full and precise.* No particulars are pointed out, in respect to which they are deemed insufficient.

No error of law appearing in the case as submitted to us, the order must be,

Report of commissioners confirmed.

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* The report as to East Main Street was as follows: "The location of East Main Street remaining unchanged, the grade of said street shall be lowered and a suitable bridge shall be built over it to support the railroad tracks so as to leave a clear head-room of at least twelve feet above the new grade of the street. The elevation of the grade of said East Main Street under the bridge shall be fourteen and twenty-five one-hundredths feet below the grade of the top of the rails of said company's track. From a point in said street eighty-five feet northerly from the base line of the new location of said railroad the grade shall rise northward at a rate of two feet in one hundred feet until said new grade shall intersect the present grade, and from a point in said street sixty-four feet southerly from said base line of location the grade shall rise southward at a rate of three and one half feet in one hundred feet until said new grade shall intersect the present grade. The said East Main Street shall be graded to its full width, and the roadway shall have a dressing of good gravel to the depth of ten inches, with the proper crowning in the middle."

Similar provisions as to the extent of grading in the other cases were inserted.

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GEORGE W. JOHNSON, receiver, *vs.* HIRAM P. GERALD & others.

Worcester. October 7, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Bond — Treasurer of Savings Bank — Approval by Trustees — Action — Defence — Delivery and Acceptance.

The treasurer of a savings bank was also treasurer of a town and the proprietor of a store, in the rear room of which was the office of the bank. In the front room was a desk at which he was accustomed to do business of the bank and of the town, as well as of himself. He embezzled moneys of the bank and absconded, and afterwards a bond, properly executed nearly five years previously, given to secure the faithful performance of his duties as treasurer of the bank, was found with other papers behind the desk on a shelf where he often put papers and books belonging to the bank, as well as others. The shelf was not intended as a permanent place of deposit for valuable papers, but was ordinarily used as a place where articles were left temporarily. In an action by the receiver of the bank on the bond, the treasurer testified that he left the bond on the shelf soon after it was executed, that it passed out of his memory, and that it remained there until it was found after he had absconded. *Held*, that the evidence warranted a finding that the bond was delivered so as to take effect as a binding contract.

A bond of the treasurer of a savings bank may become binding without a formal vote of approval by the trustees of the bank.

It is no defence to an action on a bond given by the treasurer of a savings bank that an attested copy of the bond sent to the commissioners of savings banks was not accompanied by a certificate of the custodian of the bond that the original was in his possession, as required by St. 1889, c. 180.

A bond, properly executed, given to secure the faithful performance of the duties of the treasurer of a savings bank, and dated one day before the expiration of five years from the time when a statute took effect requiring such treasurers to give a new bond as often as once in five years, remained in the hands of the treasurer for nearly five years after he returned a copy of it to the commissioners of savings banks, as required by statute, and two of the trustees of the bank signed it as sureties. In an action on the bond, some of the trustees testified that the bond was not presented for approval at any meeting at which they were present; and there was evidence indicating that the memory of some of the witnesses was imperfect and unreliable. *Held*, that there was circumstantial evidence proper for the consideration of the jury tending to show that the bond was to the satisfaction of the trustees.

If a bond, properly executed, given to secure the faithful performance of the duties of the treasurer of a savings bank, remains in his custody for nearly five years and is found after he has absconded in the place where he kept it with other papers, by the receiver of the bank, although there has been no formal approval of the bond by the trustees of the bank, the bringing of an action on the bond by the receiver is a ratification, if ratification is necessary, of the act of the

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treasurer in accepting and holding the bond after delivery which may give it effect as a binding contract, there being no evidence that his action was ever objected to by the corporation, or by any member of the board of trustees.

CONTRACT, by the receiver of the Brookfield Savings Bank, upon a bond executed by the first named defendant as principal, and by the other defendants as sureties, and conditioned for the faithful performance by him of the duties of treasurer of the bank. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff; and the defendant sureties alleged exceptions. The facts appear in the opinion.

C. M. Rice, (*W. A. Gile & H. W. King* with him,) for the defendant sureties.

W. S. B. Hopkins & R. Hoar, (*W. S. B. Hopkins, Jr.* with them,) for the plaintiff.

KNOWLTON, J. The defendants alleged at the trial that the bond was signed by the sureties upon an agreement that it should not take effect until it was also signed by the father of the principal, and that he never signed it. In reply to a question in writing submitted to them by the judge, the jury found that there was no such agreement between the principal and any of the sureties, and this part of the defence therefore fails.

The other contention of the defendants is that there was no evidence sufficient to warrant a finding that the bond was delivered so as to take effect as a binding contract, and that the presiding judge failed to give the jury proper instructions upon this branch of the case. The instrument was perfect in form, was signed by the principal and five sureties, and was executed in the presence of attesting witnesses. It bears date one day before the expiration of five years from the time when St. 1886, c. 93, (now St. 1894, c. 317, § 14,) took effect, requiring treasurers of savings banks to give a new bond as often as once in five years. A letter had previously been sent by one of the commissioners of savings banks asking for it. The treasurer filed with the commissioners of savings banks an attested copy of this bond, and so complied with St. 1889, c. 180, (now St. 1894, c. 317, § 14,) except that he did not accompany it with a certificate of the custodian of the bond that the original was in his possession. The treasurer was also treasurer of the town of Brookfield, and the proprietor of a drug store. The office of

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the bank was in the rear room in his store. In the front room was a desk, at which he was accustomed to do business of the bank and of the town, as well as of himself. The bond was found, with other papers, behind the desk on a shelf, where he often put papers and books belonging to the bank, as well as others. The shelf was not intended as a permanent place of deposit for valuable papers, but was ordinarily used as a place where articles were left temporarily. The treasurer testified that he left the bond there soon after it was executed, that it passed out of his memory, and that it remained there until it was found after he left the bank and went away. It appeared that he embezzled moneys of the bank and absconded nearly five years after the bond was signed. His statement that he intended to obtain the signature of his father, in accordance with an agreement made between him and the sureties, must have been disbelieved by the jury.

There was ample evidence to warrant a finding that, after this bond was completely executed, he, as the principal in it, intended to deliver it to give it effect as a binding contract, and to have it pass from the possession of himself as the principal obligor to himself as the officer of the bank who was the general custodian of the bank's books and papers. The jury might well find that, acting officially, he afterwards held it on account of the bank as its property. They might find this, notwithstanding that St. 1889, c. 180, contemplates that the trustees of a savings bank will appoint some other person than the treasurer to be the custodian of his official bond.

The defendants contend that the bond could not become binding without a formal approval by a vote of the trustees that it was to their satisfaction. But this contention is unfounded. Their approval of it did not need to be by a formal vote. *Amherst Bank* v. *Root*, 2 Met. 522, 534. Nor is it a defence to this action that the attested copy of the bond sent to the commissioners of savings banks was not accompanied by a certificate of the custodian of the bond that the original was in his possession. The provision of the statute in regard to this is directory, and if a failure to comply with it subjects the treasurer to a penalty, or other officers to any other liability, it does not affect the validity of a proper bond which has been duly delivered and accepted. *Amherst Bank* v. *Root*, *ubi supra*.

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There was circumstantial evidence proper for the consideration of the jury tending to show that the bond was to the satisfaction of the trustees. The trustees may fairly be presumed to have known the law, and to have known that a new bond was required at or about the time this was given. This bond remained in the hands of the treasurer for nearly five years after he returned a copy of it to the commissioners of savings banks. Two of the members of the board of trustees signed it as sureties. The testimony of some of the members of the board that the bond was not presented for approval at any meeting at which they were present was not conclusive. There was evidence indicating that the memory of some of the witnesses was imperfect and unreliable. We are of opinion that there was evidence for the jury in support of this part of the plaintiff's case.

But even if the trustees as a board never considered the question whether the bond was sufficient, we are of opinion that there was evidence to warrant a finding that the bond was delivered and accepted as a binding contract. The jury might well believe that the principal obligor delivered it as an individual to himself as an executive officer of the bank, and that as such executive officer he assumed to accept it, and continued to hold it as the property of the bank until he absconded, leaving it in the place where he had kept it. There it was found, and it passed to the receiver as a part of the property of the bank. In *Amherst Bank* v. *Root*, 2 Met. 522, 533, a distinction is pointed out between an act which would amount to an acceptance of a bond on the part of a corporation so as to give it legal effect as against the obligors, and that expression of approbation on the part of the directors which is required by its charter and by-laws. It is stated that, if the bond was properly executed and delivered in the mode required by law to give it effect, it may be deemed the deed of the principal and sureties to be enforced against them, although it may never have been approved by the directors. If the bond in the present case was delivered as and for a proper bond, the treasurer, as the chief executive officer of the bank, having the general custody of the papers of the bank, was authorized to hold it for the bank as its property, at least until the ownership of it was repudiated by

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the trustees, or until some other action was taken by them in regard to it. He could not determine the question whether it was satisfactory to them so as to relieve himself of the duty to give another bond if they were not satisfied. But his official acceptance and holding of it after the delivery might give it effect as a binding contract, at least if his action was subsequently ratified by the trustees, or by the receiver if no action was taken by the trustees before the appointment of a receiver. The bringing of this suit by the receiver is in law a ratification of his action in this particular, if ratification is necessary, there being no evidence that his action was ever objected to by the corporation, or by any member of the board of trustees. We are of opinion that the instructions to the jury on this part of the case, as applied to the evidence, were sufficient.*

All the requests for instructions, and all the instructions given

* These instructions were, in substance, as follows: "A bond, like this, is a contract between two or more parties, and to make it a valid contract there must be what the law calls a delivery of it. There is no definition, that I know of, — a brief definition that can be cited of what a delivery is. But it ordinarily means that the contract shall have passed from the promisor into the possession and control of the promisee, or of somebody who holds it for him. Now it is sometimes said in books, that where a contract is made for the benefit of A. B., as, for instance, this bond for the benefit of this bank, and the bond is found in the possession of the bank, and there is no other evidence about it, delivery would be presumed. Acceptance would be presumed. In the case supposed here is a paper which is manifestly for the benefit of the bank, intended to give the bank security. It is found in the possession of the bank, but the parties are dead or gone away, and no evidence is produced and nothing can be produced, and there is no acceptance minuted upon it and no record of it; the courts say, under such circumstances, acceptance may be presumed, — delivery and acceptance may be presumed, — upon the theory that that is the most natural view to take of it. The instrument has gone out of the hands of those who signed it and who are to be bound by it, and it is in the hands of the party who is to be benefited by it, and if nothing else appears, why, the natural view to take of it is that it is properly there; that the bank has not stolen it or got it without right, but that it has by the ordinary course of things got into the hands of the bank for whose benefit it was intended. . . . The bond in suit must have been executed or delivered to an officer of the bank in order to be a valid instrument. It makes no difference that this officer was treasurer whose bond it was. If the jury are satisfied by the fair preponderance of the evidence that the instrument in suit, after its execution by the signers, was retained by Gerald as treasurer of the bank, there is a sufficient delivery."

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in regard to the effect of an agreement that the treasurer's father should sign as surety were rendered immaterial by the finding of the jury that there was no such agreement.

The exception to the refusal to rule that, upon all the evidence, the jury were not entitled to find that the instrument was ever delivered as a common law bond, and the exception to the admission in evidence of the attested copy of the bond sent by the treasurer to the commissioners of savings banks, have not been argued, and we treat them as waived. No question was raised in regard to the right of the receiver to sue in his own name.

We discover no error in the proceedings at the trial.

Exceptions overruled.

FRANK C. FOWLER *vs.* INHABITANTS OF GARDNER.

Worcester. October 7, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Defective Highway — Street Railway — Evidence — Exceptions.

In an action against a town for personal injuries occasioned to the plaintiff by an alleged defect in a highway, consisting of a guard rail at a curve in the tracks of a street railway, it is competent for the defendant to show that such a guard rail was necessary to the operation of the railway at the place of the accident; and the defendant is also entitled to a ruling that, if the railway "is constructed in a proper manner, and if in fact the portions of its constructions which may be complained of as defects are necessary to its operation as a street railway, though it or they may be obstacles to travel, or present dangers to those using vehicles, they would not on that account be defects in the way."

The bill of exceptions in this case, which was an action against a town for personal injuries, is to be interpreted as showing that the defendant's offers of proof and requests for rulings related to the condition of the street railway at the time of the accident, and not to its original construction.

TORT, for personal injuries, occasioned to the plaintiff by an alleged defect in a highway in the defendant town. Trial in the Superior Court, without a jury, before *Hardy*, J., who allowed a bill of exceptions, in substance as follows.

The defect complained of was the existence in the highway,

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at a curve in the street railway passing from the tracks from one street into another, of a guard rail on the inside of the track, with which the sleigh in which the plaintiff was riding came in contact, and it was overthrown. The evidence, all of which was by estimate from observation, tended to show that the guard rail stood from one to two inches above the level of the stone paving next the rail, and from one half an inch to an inch above the track which it served as a guard rail; that this guard rail extended in a curved line from the side to the middle of the street, and the end of the guard rail in the middle of the street was left projecting there in a right-angular corner; and that at this point a car moving north would make this turn to the left, or the west, on a radius of forty-eight feet, and the track to the inside of which this guard rail was laid would be the west track. No question was raised as to the railway corporation being legally chartered and having a legal location at the place in question, and a right to maintain the tracks there, although the plaintiff refused to admit that the tracks were exactly in accordance with the terms of the franchise or specifications for their location.

The defendant offered the location given by the selectmen of the town to the railway corporation, which was admitted to prove that a location was given. The defendant then asked the general manager, who had constructed the road and managed it after its construction, whether or not the road was built in accordance with the location which was shown him.

The plaintiff objected to the evidence, as involving a construction of the franchise and also of law. The judge excluded the question, and ruled that it was incompetent and irrelevant, in view of the admission made by the plaintiff that there was a legal location for the railway.

The superintendent of the railway corporation, who was called as a witness by the defendant, was asked, "At the time of the accident, what do you say about the guard rail at that point, as to being in or out of order?" The plaintiff objected to this question.

The defendant then asked, "I want to ask about the firmness of the structure, what its condition was?" The judge said, "I shall allow the witness to testify as to what the condition of the track was, if he can so testify without giving an opinion." The

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defendant then asked, "I am asking you in what condition it was?" The witness answered, "Good condition."

His examination was continued as follows: "*Q.* In what respect? *A.* Perfect; the guard rail conformed to the main rail of the track. — *Q.* What was its condition as to firmness? *A.* It was firm."

Upon the question of the construction of the track, the judge stated to the defendant's counsel that he would put no restrictions upon the defendant as to the proof of the actual condition of the track at the place of accident.

The defendant called as a witness one Ordway, who testified that he was roadmaster of the Fitchburg and Leominster Street Railway Company, and had been engaged in that business about six years; and that he put in a switch and frog, and changed the curve a little in the railway at the point where the accident happened to the plaintiff, and also put in this guard rail in the fall of 1894.

He was then asked the following question: "Whether, in your experience and observation and judgment as a street railroad man and as roadmaster, the construction of that switch and turnout at that point was a proper method of construction in that place on that curve?"

The plaintiff objected, on the ground that the witness had not been qualified as an expert on construction of tracks, and on the further ground that whether the rail complained of as a defect was proper construction for a railroad was immaterial. The judge excluded the question, but stated that it might be proper for the defendant to offer evidence that the rail was left in good condition.

The defendant's counsel then said, "I am going to show, in a moment, he left it in a condition which I claim a right to show is proper construction. The next question I propose to ask is, whether a guard rail is necessary on a curve with that radius, whether a guard rail is necessary to the operation of the road. I claim the right to prove proper construction, and a proper condition."

The judge stated, "If you ask the question with reference to that particular place, I do not know but I ought to allow it to be answered, but if you ask it in the sense of what is the method

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usually adopted by railway companies, I do not think I ought to allow it, not in that sense." The defendant's counsel then stated, "I will limit my question, as your honor suggests, by adding, 'in that place on that curve.'"

The plaintiff's counsel then said, "I presume what they seek to show is, was this in a proper condition. I object to its being shown in this way."

The judge remarked, "I think, as I understand the question now, I shall have to exclude it"; and the defendant excepted.

The defendant's counsel then asked the witness, "Whether in your opinion, as roadmaster of electric roads, and your familiarity and observation, a guard rail is necessary on a curve of that sharpness?" This question was objected to, and the judge excluded it; and the defendant excepted.

At the conclusion of the evidence, the defendant asked the judge to rule as follows: "If the street railway is duly established by law, with a rightful location and the right to operate as a street railway in the highway, the fact that it is some obstacle to travel does not of itself permit the finding that its existence there constituted a defect in the highway. If it is constructed in a proper manner, and if in fact the portions of its construction which may be complained of as defects are necessary to its operation as a street railway, though it or they may be obstacles to travel, or present dangers to those using vehicles, they would not on that account be defects in the way." The judge declined so to rule; and the defendant excepted.

The judge found for the plaintiff; and the defendant alleged exceptions.

W. S. B. Hopkins & J. M. B. Churchill, for the defendant.

H. Parker, for the plaintiff.

ALLEN, J. If by reason of improper construction or negligent maintenance the railroad was in an improper condition at the time and place of the accident, and thus rendered the highway unsafe for travellers, it is well settled that the town is primarily responsible, though it might have a remedy over, by virtue of Pub. Sts. c. 113, § 32. *Hawks* v. *Northampton*, 116 Mass. 420. *Prentiss* v. *Boston*, 112 Mass. 43. *Johnson* v. *Salem Turnpike & Chelsea Bridge Co.* 109 Mass. 522. But if the location of the railroad was duly authorized, and it was built and maintained in

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a proper condition, then it was lawfully in the highway, and the town would have no right to remove it, and cannot be held liable for an injury to a traveller occasioned by it. *Davis* v. *Leominster*, 1 Allen, 182. *Jones* v. *Waltham*, 4 Cush. 299. *Young* v. *Yarmouth*, 9 Gray, 386. *Cushing* v. *Boston*, 122 Mass. 173. *Lawrence* v. *New Bedford*, 160 Mass. 227. It was therefore competent for the defendant to show that the condition of the railroad at the time and place of the accident was such as was proper and necessary for its safe operation, and that a guard rail such as was used at that place was necessary.

The plaintiff now contends that evidence to this effect was not excluded; but we think it quite plain that the defendant offered to show that a guard rail was necessary to the operation of the road in that place, on that curve; and that the evidence was excluded.

A similar question is presented by the defendant's request for a ruling, that if the street railway "is constructed in a proper manner, and if in fact the portions of its construction which may be complained of as defects are necessary to its operation as a street railway, though it or they may be obstacles to travel, or present dangers to those using vehicles, they would not on that account be defects in the way." This is in substantial accordance with the doctrine as established by the decisions above cited, and should have been given.

The plaintiff at the argument contended that the defendant's offers of proof and requests for rulings all related to the original construction of the railroad, and not to its condition at the time of the accident. But this appears to us to be too narrow an interpretation of the bill of exceptions. There is nothing to show that the condition of the railroad had deteriorated, or that any point of this kind was made at the trial. Fairly construed, we think the offers of evidence and the requests for instructions related to the condition of the railroad at the time of the accident.

The result is that the entry must be,

Exceptions sustained.

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OLLIE G. FRENCH *vs.* HARTFORD LIFE AND ANNUITY INSURANCE COMPANY.

Worcester. October 7, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Life Insurance on the Assessment Plan — Termination of Policy by its Terms — Waiver — Payment of Premium — Statute.

A policy of life insurance was issued by a company, in consideration, among other things, of certain quarterly payments for seven years, to be made on the first day of the quarter, with four days of grace, and if at the end of those days the sum had not been paid all rights under the policy were at an end, and the member only could apply for reinstatement, which was not to be granted unless the application was accompanied by a health warrant. The application agreed that the reinstatement, if granted, should not waive forfeiture for future non-payments. For the two years and a half during which the policy was running before his death, the insured let the days of grace elapse in all but three instances, and was reinstated upon application and giving a health warrant. A payment fell due on July 4, 1896, with grace on July 8. It had not been made on July 9, on which day the insured was drowned. On July 10, the sum was forwarded to the company in the name of the insured, and was returned with notice that an application for reinstatement was necessary. *Held*, in an action by the beneficiary against the company, that the policy was at an end by its terms; that there was no waiver; and that the provisions of § 2 of St. 1896, c. 515, entitled "An Act relative to assessment insurance corporations," did not apply to the payment in question.

CONTRACT, by the beneficiary named in a policy of life insurance issued by the defendant company on January 4, 1894, upon the life of William M. Hyland. The case was submitted to the Superior Court, and, after judgment for the defendant by *Gaskill*, J., to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

J. K. Greene, for the plaintiff.

T. H. Gage, Jr., for the defendant.

HOLMES, J. The policy was issued in consideration, among other things, of quarterly payments of six dollars and eighteen cents for seven years. These payments were to be made on the first day of the quarter, with four days of grace. If at the end of the days of grace the sum had not been paid all rights under the policy were at an end, and the member only could apply for reinstatement, which was not granted unless the application was

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accompanied by a health warrant. The application expressly agreed that the reinstatement, if granted, should not waive forfeiture for future non-payments. For the two years and a half that the policy was running before his death, Hyland let the days of grace elapse in all but three instances, and was reinstated upon application and giving a health warrant. A payment fell due on July 4, 1896, with grace on July 8. It had not been made on July 9, on which day Hyland was drowned. On July 10 the sum was forwarded to the defendant in his name, and was returned with notice that an application for reinstatement was necessary. On the facts agreed, the judge found for the defendant, and the plaintiff appealed.

We are of opinion that the decision of the Superior Court was right. By the terms of the policy all rights under it were at an end; and the fact that on former occasions late payments had been accepted had no effect in waiving the defendant's rights, since the forms of reinstatement always were insisted upon, and even an agreement that there should be no waiver was required in each case. *Crossman* v. *Massachusetts Benefit Association*, 143 Mass. 435.

The plaintiff is not helped by § 2 of St. 1896, c. 515, entitled "An Act relative to assessment insurance corporations." By that section, in the case of policies issued by companies doing business on the assessment plan, at the expiration of the time for payment stated in each call or notice of an assessment for mortuary, disability, or expense purposes, persons who have failed to pay are to be notified, and are allowed fifteen days after the receipt of the notice to make the payment and keep the policy in force. In the present case, beside the premiums above mentioned, after seven years had elapsed there was a liability to calls for the mortuary fund, and it may be assumed that these calls were assessments. But the liability for a premium during the seven years was not an assessment within the meaning of the act. The assessments for mortuary, disability, or expense purposes mentioned in § 2 are calls for sums uncertain beforehand, and determined by the other party to the contract with reference to the purposes mentioned, not demands for sums fixed by mutual agreement beforehand, to be paid to the general use of the company in case the member elects to continue the policy

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in force. The distinction is marked in the statutes. See, e. g., St. 1890, c. 421, § 1 ("not upon fixed payments but upon the collection from time to time of an assessment"); *New England Ins. Co.* v. *Belknap*, 9 Cush. 140, 147.

Upon our construction of § 2, it is unnecessary to consider other questions which would have to be determined before the plaintiff could recover. One of them is whether the act of 1896 purports to affect or could affect a contract made by a foreign company before the statute was passed. Another, the answer to which is plain, is how, if the act of 1896 does apply to this case throughout, the insurable interest required by § 7 can be attributed to a woman on the ground that she was engaged to a member, when at the time of the engagement and at the date of the policy she was married to another man, and when even at the date of the member's death a decree of divorce obtained by her shortly before that time had not become absolute.

Judgment for the defendant.

AMORY S. HAYNES *vs.* CLINTON PRINTING COMPANY.

Worcester. October 8, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Libel — Action — Privilege — Innuendo — Surplusage.

An article in a newspaper, containing the statements that a person named is suspected of murder, and that there are said to be grounds of suspicion, and which is open to the interpretation that it was intended in a veiled way to countenance the suspicion, and also containing the statement that there is a rumor of his confession, is libellous, and its publication is actionable without an allegation of special damage.

Upon the question whether words published in a newspaper are privileged, as on the question whether they are libellous, the same rule applies to repetitions or insinuations of what is false that applies to false statements directly made.

If the innuendos in a declaration for libel are not borne out by the words in the article complained of, they may be rejected as surplusage, when the words, read as ordinary persons would understand them, are libellous *per se*.

TORT, for alleged libels, contained in two articles printed on July 3 and October 22, 1896, respectively, in a newspaper

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owned and published by the defendant in Clinton. The declaration, as amended, contained four counts, numbered sixth, seventh, eighth, and ninth. The defendant demurred to the declaration, assigning various grounds of demurrer. In the Superior Court, *Hardy*, J. sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court. The facts appear in the opinion.

W. S. B. Hopkins, (*J. Smith* with him,) for the plaintiff.

J. W. Corcoran, (*W. R. Dame* with him,) for the defendant.

HOLMES, J. A libel does not need the categorical certainty of an indictment at common law. An insinuation may be as actionable as a direct statement, and nothing is better settled than that a defendant cannot escape liability merely by putting the insinuation or statement into the mouth of somebody else. *Hurley* v. *Fall River Daily Herald Publishing Co.* 138 Mass. 334, 336. *Stevens* v. *Hartwell*, 11 Met. 542, 549, 550. *Watkins* v. *Hall*, L. R. 3 Q. B. 396. Odgers, Libel & Slander, (2d ed.) 166, 266, 267, 313. The cases cited by the defendant to show that words of mere suspicion are not actionable are cases of slander, and have but a qualified, if any, application to libel. In libel it is enough, whatever the form, that the manifest tendency of the words is seriously to hurt the plaintiff's reputation, and the point at which words will be held to have that tendency is reached earlier than in slander. *Clark* v. *Binney*, 2 Pick. 113, 116. *Tillson* v. *Robbins*, 68 Maine, 295. *King* v. *Lake*, Hardres, 470. *Bradley* v. *Methwyn*, 2 Selw. N. P. (11th ed.) 1046. *Thorley* v. *Kerry*, 4 Taunt. 355; *S. C.* 3 Camp. 214.

Bearing these general propositions in mind, we have no doubt that the words used in the articles complained of were libellous. That set out in the sixth and ninth counts is headed "Singular Facts," and, referring to the death of one William F. Cohen, says of the plaintiff, "Prominent citizen of Bolton under suspicion. Said he had a motive if he is ignorant of the details of Cohen's death. . . . It may be said with assurance that the case will be sensational to a degree. A. S. Haynes [the plaintiff], a prominent citizen and town clerk of Bolton, it is believed, has fallen under the suspicion of the officers of the law, and, rightly or wrongly, the evidence will tend toward his possible connection with Mr. Cohen's death. It is hardly prob-

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able that the government can go so far as to establish any actual guilt of this person so far as the alleged murder is concerned, but it is said it will be shown that at least one man existed with a motive for the crime, whether or not he committed it." It then goes on to allege statements or rumors as to the plaintiff's money relations with Cohen, probably also libellous but unnecessary to state, which, if true in their suggestion, showed a motive, summing them up with the words, "A possible case, if not a very strong one, without the full evidence of the government." It ends with the sentences, "There are many who think the government can present no case whatever, as in the first place it is doubted if Cohen's death even can be positively established. So from the start the evidence would be wholly circumstantial and far from conclusive." It will be seen that, although the defendant does not commit itself fully to the conclusion that the plaintiff was guilty of murder, it does allege that he is suspected and that there are said to be grounds of suspicion, and the article is at least open to the interpretation that it was intended, in a veiled way, to countenance the suspicion. It does not need argument to show that such a publication tends, in the gravest way, to the injury of the plaintiff's reputation and standing.

Of the article set out in the seventh and eighth counts, it is enough to quote a part. It is headed "Cohen Case Revived," and begins, "Administrator Larkin sues Amory S. Haynes of Bolton for $489. Alleges Haynes obtained control of Cohen's money and papers, and refuses to make an accounting." Further on it continues, "The interesting portion of the case, and one of the portions that has been the darkest, that concerning the disposal of $489 belonging to Cohen, will be thoroughly investigated." Then, "Cohen . . . had to have a guardian, and Haynes is supposed to have been a self-appointed one." Later still are the following sentences: "A rumor that Mr. Haynes had confessed to the murder of Cohen was given considerable credence in town to-day, but lacks confirmation. Chief of Police Thomas Murphy, who was active in the case, professes entire ignorance. Constable Walter Cole and George H. Hurlburt of Bolton were also seen, and knew nothing concerning it." This also, it will be seen, not only states a rumor more or less accredited, but, while showing certain improbabilities, leaves the possibility of

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the truth open, and even by the tone the preliminaries as to money matters and by such expressions as "professes entire ignorance" insinuates that it may be true after all. Without going into the part relating to the money relations of the plaintiff and Cohen, we think it plain that the suggestions as to murder in this article are libellous, as well as those in the first.

The publication of such libels is actionable without any allegation of special damage. It follows that the only general ground on which the defendant can escape liability is the ground of privilege, if any such appears on the face of the declaration. The case has not been argued on that ground. It is settled that newspapers as such have no peculiar privilege. *Sheckell* v. *Jackson*, 10 Cush. 25, 27. *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238, 243. And it equally is settled that the privilege of comment and criticism on matters of public interest, which a possible murder may be assumed to be for the purposes of decision, does not extend to false statements. *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238, 242. It only remains to add that on the question whether words are privileged, as on the question whether they are libellous, the same rule applies to repetitions or insinuations of what is false that applies to false statements directly made. It follows that the demurrers to the sixth and seventh counts, which declare generally on the articles, should have been overruled.

The eighth and ninth counts allege as the gravamen the publication of the same two articles, but aver that by them the defendant imputed to the plaintiff murder and embezzlement of funds, and fraudulent retention of funds intrusted to him by the deceased. It is not necessary to state these innuendos in detail, or to consider whether they all are borne out by the words. For if they are not they may be rejected as surplusage, when, as here, the words read as ordinary persons would understand them are libellous *per se*. It is settled in England, and, so far as the question has arisen, in this country, in accordance with good sense, that to that extent the plaintiff is not debarred from relying on the wrong alleged and complained of merely because he interpreted it as going further than it did in fact. *Harvey* v. *French*, 1 Cr. & M. 11. *Simmons* v. *Mitchell*, 6 App. Cas. 156, 162. Odgers, Libel & Slander, (2d ed.) 101. *Fry* v. *Bennett*,

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5 Sandf. 54, 65. *Cooper* v. *Greeley*, 1 Denio, 347, 360, 362. *Kraus* v. *Sentinel Co.* 60 Wis. 425, 430. 2 Dane, Abr. 596.

Judgment reversed, and demurrer overruled.

EMMA J. NEWTON *vs.* CITY OF WORCESTER.

Worcester. October 9, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Defective Highway — Statute — Exceptions — Rule of Court.

Under St. 1896, c. 540, entitled "An Act relative to injuries received on highways resulting from snow or ice," a public way is not to be deemed unsafe by reason of snow or ice thereon, if it would be reasonably safe and convenient for travelers but for the presence of snow or ice thereon.

If it appears to have been well understood on all hands that one of the parties to an action wished to have the construction of a statute determined by this court in case the ruling of the presiding justice should be adverse to his contention, it is right to allow his exception, even though no statement was made in express terms that an exception was taken.

TORT, for personal injuries occasioned to the plaintiff by a defect in the sidewalk of a street, which the defendant was bound to keep in repair.

At the trial, before *Dewey*, J., it appeared in evidence that the sidewalk, at the point where the accident occurred, had depressions in its surface, caused by wear, and by reason of some of the bricks being depressed and some being elevated; that there were no projections or sharp corners, and that the surface of the depressions was smooth; that these depressions varied in depth from half an inch to three quarters of an inch, and varied in size from a comparatively small area to a depression of a foot or a foot and a half in diameter; that the adjoining premises sloped downward toward the street, and water from a gutter spout on an abutting building flowed upon a concrete walk upon said adjoining premises, and thence over and across the defendant's sidewalk at the point of accident, filling the depression in the sidewalk, and that at the time of the accident there was ice in one of said depressions, on which the plaintiff slipped and was

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injured; that this ice had been there forty-eight hours; and that no way was provided for the water from the spout to flow except upon said concrete walk and thence over the sidewalk at the place where the plaintiff fell.

There was also evidence tending to show that invariably in rainy weather water would accumulate in the depressions on the sidewalk, and in cold weather would freeze at the place where the plaintiff fell.

The defendant's second request for instructions was, that "the plaintiff cannot recover unless the jury find that, independently of any ice or snow, the way was not reasonably safe and convenient for travellers."

The judge declined to give this request, and instructed the jury upon the application to the case of St. 1896, c. 540, entitled "An Act relative to injuries received on highways resulting from snow or ice."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The plaintiff contended that the defendant did not save an exception conformably to the 50th Common Law Rule of the Superior Court, which is as follows: "No exception shall be allowed by the presiding judge, unless the same be alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given. And all exceptions to any charge to the jury shall, unless previously saved, be alleged before the jury are sent out; and if not so alleged, the same shall not be allowed. All requests for instructions shall be made in writing." It appeared that it was understood, from the beginning to the end of the trial, that the defendant wished to have the construction of the statute determined by the full court; that the judge expressed the idea in his charge to the jury that his ruling was made with the expectation of having it reviewed by the Supreme Court; that at the moment of the conclusion of the charge, without waiting at all, the judge left the bench and went to the judges' room quickly; and that when the jury went out the judge was not in the court room. Immediately upon the judge's return, the grounds of the exception were stated by the counsel for the defendant in a brief memorandum, which the stenographer took and which is embodied in the exceptions written out, and which the judge accepted and received as the form of the exception.

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The following sentences are from the judge's instructions to the jury: "I am not clear in my own mind about it, and if not clear I suppose it will be made clear by the Supreme Court"; and "I do not know, and I am free to say I do not know, whether that law as thus stated by the Supreme Court applies under this new statute of 1896 or not, but, until otherwise informed by the Supreme Court, I take it we have got to have some standard and some test of safety known, as we have had heretofore."

A. P. Rugg & W. S. B. Hopkins, for the defendant.

C. C. Milton, (*C. W. Saunders* with him,) for the plaintiff.

ALLEN, J. We think a somewhat broader construction should be given to the language of St. 1896, c. 540, than was given to it by the presiding justice. The Legislature obviously thought that too heavy a burden rested upon cities and towns under the previous statutes, and the statute was probably designed to exempt them from liability under such circumstances as were found to exist in *Adams* v. *Chicopee*, 147 Mass. 440, and *Hughes* v. *Lawrence*, 160 Mass. 474. Accordingly, it is now provided that "No city or town shall be liable for any injury or damage to person or property hereafter received or suffered in or upon any part of a highway, town way, causeway, or bridge, by reason of or in consequence of snow or ice thereon, if the place at which the injury or damage was received or suffered was at the time of the accident otherwise reasonably safe and convenient for travellers." This must mean, we think, that a way shall not be deemed unsafe by reason of snow or ice thereon, if it would be reasonably safe and convenient for travellers but for the presence of snow or ice thereon. The second request for instructions therefore should have been given.

The plaintiff contends that the defendant did not properly save an exception upon the above point. But it appears to have been well understood, on all hands, that the defendant wished to have the construction of the statute determined by this court, in case the ruling of the presiding justice should be adverse to its contention. Under these circumstances, it was quite right to allow the exceptions, even though no statement was made in express terms that an exception was taken. The allowance of the exceptions was merely carrying out the understanding which obviously existed between the court and the counsel on both

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sides; and this might be done, according to the construction which has heretofore been put upon the rule of the Superior Court. *Leyland* v. *Pingree*, 134 Mass. 367. *Thwing* v. *Clifford*, 136 Mass. 482. *Exceptions sustained.*

MOUNT MORRIS BANK *vs.* C. L. GORHAM & another.

Worcester. October 9, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Draft — Principal and Agent — Ostensible Authority — Power of Attorney — Notice to Purchaser — Evidence — Instructions.

At the trial of an action upon a draft purporting to be accepted by the drawee through a person who was his agent, the extent of the latter's authority was in controversy. The judge refused certain requests for rulings, and instructed the jury, in substance, that the drawee would not be liable simply because, if he had been sharper or more careful, he would have discovered his agent's course of dealing, but he must actually have known of acts of the agent conveying to the public the impression that his authority was greater than it was in fact, before the drawee's silence could be held to sanction the agent's course, and to give him ostensible authority to continue it. *Held*, that no error appeared.

It is only within the scope of an agent's employment that his principal must look out for the agent's misconduct when there is nothing but the employment to give warning.

If a draft is accepted by the drawee through an agent "p. p. a.," which may be found to mean "per power attorney," these letters are notice to a bank discounting the draft that the agent depended for his authority to sign upon a written document, and the bank takes its chances if it does not call for the production of the power; and, in an action on the draft, the power of attorney is admissible in evidence.

CONTRACT, upon two drafts discounted by the plaintiff. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the defendants; and the plaintiff alleged exceptions, which appear in the opinion.

C. M. Thayer & W. S. B. Hopkins, for the plaintiff.

R. Hoar & F. P. Goulding, for the defendants.

HOLMES, J. This is an action upon two bills purporting to be drawn upon the defendants by Haines and Company, payable to the order of the drawers and to be accepted by the defendants in

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the form "C. L. Gorham & Co. p. p. a. Chas. A. Williams." Williams was an agent of the defendants, who had charge of their shop, but the defendants denied that he had any authority to sign drafts, and at the trial put in a written power of attorney which is admitted not to have authorized him to do it. Their evidence tended to prove that these drafts were issued by Williams in pursuance of a scheme between Haines and him, by which a series of similar drafts had been issued, discounted, and their payment provided for, without the defendants ever having known anything about the matter. The defendants were regular purchasers of pianos from Haines and Company, but their case was that Williams was not authorized to pay for them otherwise than by check on the Central National Bank of Worcester.. The plaintiff contended that Williams's authority had been enlarged beyond the written power of attorney, and that, whether this had been done or not, the defendants were chargeable with notice of Williams's course of dealing, on the ground that at least they ought to have known of it and might have discovered it by reasonable care, and therefore that Williams had ostensible authority to sign as he did. The defendants had a verdict, and the case is here on exceptions.

1. The first exception is to the refusal to instruct the jury that "as far as third persons are concerned the apparent authority must be regarded as the real authority, where they have no notice to the contrary." It appears from the charge, and from the instruction with which we shall deal under the next mentioned exceptions, that the judge did not deny, and did let the jury understand, that ostensible authority is actual authority. Probably he declined this form of instruction as ambiguous and possibly misleading in view of the nice questions raised by the case as to what would amount to ostensible authority. It is to be observed that the instruction can have been asked only with reference to the plaintiff. For the plaintiff's evidence as to Haines and Company was that the defendants had told them in terms that Williams had full authority, so that so far as the plaintiff should put its claim on the validity of the drafts while still in Haines and Company's hands, the ground was the defendants' actual consent to Williams's course. If Haines's testimony on this point was disbelieved, the natural inference was

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that Haines and Company were acting in collusion with Williams, not that they honestly relied on an ostensible authority. But it would seem, from the tenor of the bill of exceptions and of the argument, that the plaintiff did not rely on Haines and Company, but stood on its own position as a purchaser without notice.

2. The second exception is to the refusal to rule that "the scope of an agency is to be determined, not alone from what the principal may have told the agent to do, but from what in the exercise of ordinary care and prudence he might know the agent is doing." With this may be mentioned the next request, "If an agent's authority is limited and does not include the right to use the credit of the principal, yet if the principal had by his conduct held him out as having such authority, or had by his acts, declarations, or silence given reasonable cause to people to believe that the agent had such authority, then the principal will be bound by the act of the agent." This last the court gave, modified by inserting the word "knowingly" before "given reasonable cause to people to believe." This did not mean, as it is taken by the counsel for the plaintiff, that the principal must know the effect of his agent's conduct, but that he must know what had been the conduct of his agent. The difference between the court and the plaintiff's counsel, aimed at if not quite accurately hit by the change, and brought out more fully and more clearly in the charge, was that the court thought and told the jury that the defendants would not be liable simply because, if they had been sharper or more careful, they would have discovered Williams's course of dealing, but that they must actually have known of acts of his conveying to the public the impression that his authority was greater than it was in fact, before their silence could be held to sanction his course and to give him ostensible authority to continue it. We are of opinion that the judge was right with reference to the evidence in this case. In order to test the matter, we must assume that an attempt is made to hold the defendants to contracts to which they never have consented in fact, and which were made by a third person acting wholly outside the scope of the authority intentionally conferred. The question is not what facts would be sufficient, if known to the defendants, to give them notice that

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the third person was assuming to bind them, nor what facts would be evidence of agency, — such as that a particular unlawful sale was made in the defendants' shop by one employed to sell there, — but the question is whether the defendants can be held irrespective of any knowledge beyond that of the existence of the agency, on the ground that if they had been more careful they would have known. If people were held under such circumstances, neglect of their own interests would be treated as a wrong to the public. As against the public the possibility of culpable negligence had not arisen. The defendants were not bound to anticipate, from the mere fact of employment in one direction, that their employee would go beyond the scope of his employment wrongfully in another direction. It is only within the scope of an agent's employment that an employer must look out for the agent's misconduct, when there is nothing but the employment to give warning. The defendants' counsel refer to the doctrine of ratification, which requires actual knowledge of the material facts on the part of the principal. *Combs* v. *Scott*, 12 Allen, 493, 497.

3. The next request with which we have to deal was that there was no evidence to charge the plaintiff with notice of any irregularity or want of authority in the issuing of the drafts. The signature "p. p. a." probably meant, and certainly might have been found to mean, "per power attorney." If this was the meaning, not only was this request rightfully refused, but the question of ostensible authority heretofore dealt with was at an end. The letters were notice to the plaintiff, on the face of the bill, that his agent depended for his authority to sign upon a written document, and the plaintiff took its chances if it did not call for the production of the power. *Alexander* v. *Mackenzie*, 6 C. B. 766. *Attwood* v. *Munnings*, 7 B. & C. 278. See *Stainback* v. *Bank of Virginia*, 11 Grat. 269; *Stainback* v. *Read*, 11 Grat. 281, 286. It was sufficiently favorable to the plaintiff that the judge did not instruct the jury, as matter of law, that the plaintiff took with notice.

4. In this connection we may as well dispose of the exception to the admission of the power of attorney. The reference on the face of the bill would be enough to justify it, without more. But in general, of course, a man who is sued upon a contract made in

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his name is not precluded from showing the limits of the powers expressly conferred by him, merely because the plaintiff has a right, and may attempt to show that the powers were enlarged by the defendant's subsequent conduct. The statement by the judge, that if the instrument was given it was the sole measure of Williams's authority, plainly referred only to the moment when the instrument was given. The jury were allowed to find that his authority had been enlarged afterwards by the defendants' conduct. It is suggested for the plaintiff that it did not appear that Williams had any knowledge of the document, but only that it was deposited with the bank on which he was authorized to draw checks. It is enough to say that we think that the suggestion is not fairly open on the exceptions, which assume the power to have been effective as between the parties to it.

5. The last request was that there was no evidence that the drafts were not given for value received. This naturally would be understood to refer to the issuing of the drafts by acceptance, not to their subsequent transfer to the plaintiff. There was evidence that the acceptance was merely for the accommodation of Haines. It is not necessary to consider other objections to the request. The foregoing are all the questions argued.

Exceptions overruled.

CHARLES B. SIDERS & others, trustees, *vs.* JOHN T. SIDERS & others.

Plymouth. October 19, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Will — "In Equal Shares by Right of Representation" — Per Stirpes.

Where little aid was to be derived from other parts of the will, the court said that the words "in equal shares by right of representation" must be construed to mean in equal shares, taking the bequest *per stirpes*.

PETITION to the judge of probate of the county of Plymouth, by the trustees under the will of Charles Siders, praying the instructions of the court as to their duties thereunder. The case

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was reserved, on appeal, by *Lathrop*, J., for the consideration of the full court. The facts appear in the opinion.

A. Lincoln, for the trustees, read the papers in the case.

H. Wheeler, for Charles B. Siders.

A. Lord, for the children of John Siders and their trustees.

ALLEN, J. The testator left three surviving brothers, one of whom had four children, another three, and the other two. He had no other near relatives. By his will he left an equal annuity to each of his three brothers, and legacies of $4,000 each to seven out of his nine nephews and nieces, and the income of $5,000 to each of two married nieces, with a provision that the principal should be paid to each on the death of her husband. The residue, from which the annuities would have to come, was given in trust, with this provision: "On the deaths of my brothers John, Henry, and Josiah B. Siders, convey, assign, and pay over all the residue of my said estate, real and personal, in equal shares by right of representation to my nephews Charles B., Henry F., George E., and John T. Siders, and my nieces Mrs. Sarah D. Blanchard, Mrs. Almena F. Perry, Mrs. Maria B. Orcutt, and Miss E. B. Siders, and Mrs. Isabella Marie." Of these, George E., John T., Almena F. Perry, and Maria B. Orcutt were children of the testator's brother John, and lived respectively in Hingham, Boston, Quincy, and Weymouth; Henry F., Sarah D. Blanchard, and Miss E. B. Siders were children of the testator's brother Henry, and two of them lived in Hingham, and one in Quincy; Charles B. and Isabella Marie were children of the testator's brother Josiah B., and lived respectively in Cambridge and Medford. The question presented for determination is whether the nephews and nieces take the residue *per stirpes* or *per capita*.

But for the words "by right of representation," there could be no doubt that each nephew and niece would be entitled to an equal share. But for the words "in equal shares," there could be no doubt that they would take *per stirpes*. The difficulty arises from the use of the two expressions in juxtaposition.

Not much aid is derived from a perusal of the other parts of the will. The testator's brothers fared equally. The particular bequests to his nephews and nieces have already been mentioned. His nephew Charles B. was appointed an executor.

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Another of his nephews was indebted to him, and the will contains provisions having reference to this indebtedness. There is also an intimation of indebtedness from nieces' husbands, without mentioning names. It is found as a fact that the testator's relations with Charles B. and Isabella Marie, the children of his brother Josiah B., they living more remote from him and seeing him much less frequently, were less close and intimate than with his other nephews and nieces. Charles B., however, was the only nephew selected as an executor, and $5,000 was set apart as a direct bequest for the benefit of Isabella and her children, she being treated by this bequest precisely as Almena F. Perry, a daughter of John Siders, was treated by another bequest. It cannot be said that the other parts of the will show an intention to discriminate against Charles B. and Isabella. The fact of making particular provisions for the various nephews and nieces, which were alike except in the case of two nieces who were to have more than the rest, does not show an intention to divide the residue *per capita*. A testator may wish to make a particular provision for each nephew and niece, which shall be equal or nearly equal, and to divide the residue of his estate amongst them *per stirpes*. Such a disposition is as natural as any other.

We have a difficulty in giving any adequate meaning to the words "by right of representation," except upon the theory of a distribution *per stirpes*. These words, though technical, are not obscure, and most men of ordinary intelligence, who have occasion to dispose of their property by will, and who use the words, may be supposed to know their meaning. They are found in the statutes of the Commonwealth respecting the descent of real estate, and their meaning is defined. Pub. Sts. c. 125, §§ 1, 6. The natural inference is that persons know the meaning of the terms they use, unless there is something to show the contrary. On the whole, it seems to us that the words of the will fairly import an intention to distribute the residue *per stirpes*, and some support to this view is found in the authorities collected by counsel.* The suggested construction, that

* The counsel for Charles B. Siders cited in his brief on both points the following cases: *Talcott* v. *Talcott*, 39 Conn. 186. *Raymond* v. *Hillhouse*, 45

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these words refer to the way in which children of any deceased nephew or niece should take, is not admissible, as the words are used to define the manner in which the nephews and nieces themselves shall take. The words "in equal shares by right of representation" mean in equal shares, they taking the bequest *per stirpes*. *So ordered.*

DANIEL W. DIMOCK *vs.* ELIZABETH B. RIDGEWAY.

Plymouth. October 19, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Deed — Fraud — Sale on Execution — Valid Title.

Where a wife's possibly fraudulent title obtained from her husband has been devested by a sale on execution, in an action against her husband, to one who conveys the land to the wife, the title which she thus acquires, and which she conveys by mortgage and again obtains by foreclosure, is not a fraudulent but a valid title, and a writ of entry by a creditor of her husband, who has attached all the husband's interest in the land after the foreclosure and purchased the same at the sale on execution, will not lie against the wife.

Conn. 467. *White* v. *Holland*, 92 Ga. 216. *Gibson* v. *Seymour*, 102 Ind. 485. *Allen* v. *Craft*, 109 Ind. 476. *Henry* v. *Thomas*, 118 Ind. 23. *Carter* v. *Lowell*, 76 Maine, 342. *Dawes* v. *Swan*, 4 Mass. 208. *Bowers* v. *Porter*, 4 Pick. 198, 211 *Grout* v. *Hapgood*, 13 Pick. 159. *Holbrook* v. *Harrington*, 16 Gray, 102. *Balcom* v. *Haynes*, 14 Allen, 204. *Stedman* v. *Priest*, 103 Mass. 293. *Metcalf* v. *Framingham Parish*, 128 Mass. 370, 374. *Minot* v. *Taylor*, 129 Mass. 160. *Towne* v. *Weston*, 132 Mass. 513. *Hall* v. *Hall*, 140 Mass. 267. *Towle* v. *Delano*, 144 Mass. 95, 99. *Cummings* v. *Cummings*, 146 Mass. 501. *Townsend* v. *Townsend*, 156 Mass. 454. *Denfield, petitioner*, 156 Mass. 265. *Bigelow* v. *Clap*, 166 Mass. 88. *Hale* v. *Hobson*, 167 Mass. 397. *Intermute* v. *Snyder*, 2 Green Ch. 489. *Brown* v. *Lyon*, 2 Seld. 419. *Corrigan* v. *Kiernan*, 1 Bradf. 208, 210. *Rushmore* v. *Rushmore*, 12 N. Y. Supp. 776. *Minter's appeal*, 40 Penn. St. 111. *Doebler's appeal*, 64 Penn. St. 9, 15. *Hoch's estate*, 154 Penn. St. 417. *Ashburner's estate*, 159 Penn. St. 545. *Busby* v. *Busby*, 1 Dall. 226. *Swinburne, petitioner*, 16 R. I. 208. *Lott* v. *Thompson*, 36 S. C. 38. *Thellusson* v. *Woodford*, 4 Ves. 227. *Chambers* v. *Brailsford*, 19 Ves. 652. *Davis* v. *Bennett*, 4 DeG., F. & J. 327. *Brett* v. *Horton*, 4 Beav. 239. *Ranelagh* v. *Ranelagh*, 12 Beav. 200. *In re Coleman*, 4 Ch. D. 165. *Leach* v. *Jay*, 6 Ch. D. 496. *Hodgson* v. *Ambrose*, 1 Doug. 336. *Doe* v. *Cooke*, 7 East, 269. *Lane* v. *Stanhope*, 6 Durn. & E. 345, 352.

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WRIT OF ENTRY, dated January 26, 1897, to recover a parcel of land in Brockton, the demandant having, on September 29, 1896, attached all the interest of the tenant's husband therein, and having purchased the same at the sale on execution on January 2, 1897. Plea, *nul disseisin*. Trial in the Superior Court, before *Wardwell*, J., who directed a verdict for the tenant; and the demandant alleged exceptions.

E. F. Leonard, for the demandant, submitted the case on a brief.

No counsel appeared for the tenant.

BARKER, J. The tenant's title goes back to March 27, 1882, when the land held in fee by her husband was attached as his, in a suit which resulted in a sale on execution to one who conveyed the land to the tenant. During the pendency of the suit, on April 28, 1882, the husband's title was transferred to the tenant, by conveyances which the evidence tended to show were fraudulent as to the husband's creditors then having claims against him. On March 18, 1884, the tenant mortgaged the land, for a valid consideration, to one who took the mortgage in good faith, and had no notice of any fraud. This mortgage was foreclosed by sale on January 29, 1885, and on the same day the purchaser's title was conveyed to the tenant. The husband became indebted to the demandant after the date of the mortgage, and on September 29, 1896, the demandant sued the husband and attached the lands as his property, the record title to which stood in the name of the tenant, and he seeks to recover on a sale of the lands made in pursuance of this attachment. His exception is to a ruling that under the foreclosure the tenant had obtained before the demandant's attachment the title of an innocent purchaser for value, and that therefore the demandant could not recover.

The demandant concedes it to be the rule that an innocent purchaser for value can convey good title, but contends that when the title becomes revested in a party to the original fraud it may be reached in his hands, as though he had never parted with it. It is unnecessary to consider this question, because, if the conveyances of April 28, 1882, were fraudulent, as the evidence tended to show, the title which the tenant acquired by them was devested by the execution sale in pursuance of the

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attachment of March 27, 1882, and the title which she thus acquired, and which she conveyed by the mortgage and again obtained by its foreclosure, was not a fraudulent but a valid title derived from the attachment of March 27, 1882.

Exceptions overruled.

MICHAEL ROSKEE *vs.* MOUNT TOM SULPHITE PULP COMPANY.

Hampshire. October 20, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Defective Machine — Instructions — Evidence — Exceptions.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged jumping of a table on which boards were placed to be sawed by a circular saw in the plaintiff's charge, a person who has been foreman in the room, and has inspected the table just after the accident, is properly allowed to testify that, about six days later, the condition of the table being the same so far as he knew, he took the bolts out of each end of the table and loosened the back and saw no effect in making the table jump, and his statement is not made inadmissible by the fact that later, on cross-examination, he said that he did not remember that he touched the right hand bolt, especially if, even as qualified, the evidence tends to contradict the plaintiff's witnesses.

At the trial of an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged jumping of a table on which boards were placed to be sawed by a circular saw in the plaintiff's charge, a witness who has been foreman in the room is properly allowed to state that the effect of looseness sufficient to permit the saw to strike the sides of the slots in which it revolved would be to drive the table from the saw, not to draw it towards it, having previously stated that he thought he had experience, and had noticed what the effect would be.

At the trial of an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged jumping of a table on which boards were placed to be sawed by a circular saw in the plaintiff's charge, an expert machinist was asked the following question: "Assuming . . . that the right hand bolt was somewhat loose, the left hand bolt is out completely, and that rear block there is loose enough to have the bolt put right down through into the hole, what effect, if any, could that have on the jumping of the saw table, in consequence of the saw striking the metal or on the saw table?" *Held*, that the question was properly admitted.

The bill of exceptions in this case was criticised for setting out immaterial evidence in the form of question and answer at great length, instead of condensing

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the material portions into a short narrative. It was also said that only the material portions of the charge to the jury, not the whole charge, should be printed.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged negligence of the defendant. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

A. L. Green & W. C. Heywood, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

HOLMES, J. This is an action of tort for the loss of the plaintiff's fingers, caused, as the plaintiff alleges, by the jumping of a table on which boards were placed to be sawed by a circular saw in charge of the plaintiff. Both parties tried the case on the footing that the table was in the same condition as when the plaintiff began his employment at it, a considerable time before; but the defendant said that the table was safe, unless it had been left unscrewed by the plaintiff or a fellow workman on the occasion of changing saws; the plaintiff said that it was unsafe from the beginning, by reason of certain defects. We assume that there was evidence to warrant each view of the facts. The defendant's evidence also tended to show that the accident could not have happened as alleged, and that it happened in a different way. If the plaintiff's evidence had been believed by the jury, we are at a loss to see how he could have avoided the objection that the danger was obvious, and that the proximate cause of the injury was his own negligence in continuing to work on the machine. Or, if the accident had been due to the failure to screw the table firmly down after it had been unscrewed in order to change saws, the neglect must have been the plaintiff's own or that of a fellow workman. The defendant furnished sufficient bolts and nuts. But the judge left the case to the jury, and in his charge instructed them that if the machine was in an improper condition at the time when the plaintiff came into the defendant's employ, "if you find it was out of repair in such a way as to be carelessness on the part of the defendant, and if you find it continued in that condition and was not put in repair afterwards, why then you may find that the corporation was negligent in that respect." At the end of

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the charge the plaintiff requested this additional ruling: "If the table had been in a dangerous condition owing to lack of bolts and looseness of parts, etc., and had been in such a condition so long that the company knew or ought to have known its condition, and from the length of time it remained in that condition knew or ought to have known that its servants were not repairing it, defendant was negligent in not having the repairs made." This was refused, and the plaintiff excepted.

So far as appears, the judge properly refused the ruling, on the ground that it was an attempt to get a last word with the jury when the proper time for requests for rulings had gone by, and when the judge already had instructed them to the same effect, although with somewhat less of detail, and more correctly. The form in which the request was cast by the plaintiff, without further explanation, naturally would have led the jury to suppose that, if the facts stated were true, the defendant was liable, whereas, if the defendant ought to have known the danger, a competent workman who was at the machine ought to have known it equally well, and the risk was his if he chose to keep at work and say nothing.

An exception was taken to the admission of evidence of one Spencer, — who had been foreman in the room and had inspected the table just after the accident, — that about six days later, the condition of the table being the same so far as he knew, he took the bolts out of each end of the table and loosened the back, and saw no effect in making the table jump. So far as appeared when the evidence was admitted, the experiments were instructive. It is urged that later, in cross-examination, the witness said that he did not remember that he touched the right hand bolt. If that had invalidated the experiments it would not have shown that the statement as first made was inadmissible. But even as qualified the evidence tended to contradict the plaintiff's witnesses.

Spencer was allowed to state that the effect of looseness sufficient to permit the saw to strike the sides of the slots in which it revolved would be to drive the table from the saw, not to draw it towards it, having previously stated that he thought he had experience and had noticed what the effect would be. If the plaintiff denied the proposition, it was proper for an ex-

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perienced man to prove it. If he admitted it, the evidence did no harm.

An expert machinist was allowed to answer the following question: "Assuming . . . that the right hand bolt was somewhat loose, the left hand bolt is out completely, and that rear block there is loose enough to have the bolt put right down through into the hole, what effect, if any, could that have on the jumping of the saw table, in consequence of the saw striking the metal or on the saw table?" No objection to the qualification of the expert was taken, or, so far as appears, could have been maintained. It is objected that the hypothesis does not include a split bolt hole on the right hand side, but that is material only as tending to make the bolt loose, as was supposed, and moreover the defendant denied the defect. The defendant had a right to show how the machine would work if its evidence was true, as well as in the opposite case.

The exceptions in this case, as in several others which lately have come before us, are open to criticism for setting out immaterial evidence in the form of question and answer at great length, instead of condensing the material portions into a short narrative, which easily might have been done. We may mention with reference to a growing practice, — not pursued in this case, however, — that only the material portions of the charge should be printed; not the whole charge, as has been done several times. *Exceptions overruled.*

CHARLES J. FRENCH *vs.* COLUMBIA SPINNING COMPANY.

Bristol. October 25, 1897. — November 23, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Assumption of Risk — Evidence.

An employer does not owe to an employee the duty of changing a running board in the employer's mill, with the position and length of which board the employee has long been familiar, and which was the same as at the time when he entered the employment; and, in an action for injuries occasioned to him by his inadvertently stepping too near the end of the running board in order to reach for-

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ward with his broom to clean a coupling which was about six feet farther on
evidence offered to show that the arrangement was different from that usual
furnished in other like establishments is properly excluded.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration was under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Sheldon*, J., who allowed a bill of exceptions, in substance as follows.

In the room in which the plaintiff was injured there was what was known as a running board, fourteen inches wide and about twelve feet above the floor of the room, constructed so as to run along over the mules four feet below the shafting, and at a distance of about a foot from and outside of the shafting. This running board was held in position by iron rods suspended from and fastened to the ceiling, and extended from the end of the room where the mules were located as far down the room as there were mules actually set up, and a short distance farther above the place where certain other mules were to be set up at some future time. At that point the running board turned and ran across the room to and beyond the counter shaft connected with the mules, which ran substantially parallel to and at some little distance from the main shaft, and then, turning again, ran along on the outside of the counter shaft, in the same relative position to the counter shaft that it bore to the main shaft, back to the end of the mule room, from which it started.

This running board was used in oiling and cleaning the machinery. Upon the inside of its entire length was a railing used for the purpose of protecting the employee in leaning towards the machinery in doing this work. About six feet from the running board, where at the end of the mule department it turned to go across to the counter shaft, there was a coupling on the main shaft, this coupling being over the space separating the mule from the winding department.

The plaintiff testified in his direct examination that he was employed by the defendant in November, 1894; that he was hired to take care of the shafting and floor in the mule room, and keep the room clean; that when he went there the running board was in position, the rail not being all up, but it was put up shortly afterward; that when the accident happened, while

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was on February 1, 1896, the running board rail and all the rest of the machinery and appliances had been completed, and in the condition in which they then were, for more than a year; that when he was put to work he was told to clean the coupling; and that he had cleaned this coupling once before the accident, at which time he stood on some boxes on the floor and used a long broom.

He further testified, "I was up brushing off the running board and cleaning around, and I came to the end and I saw a little cotton on the coupling and dust, and I fixed the broom in my hand and commenced to brush it, and I did not think I was so very near the end, and away I went down"; that he could not have reached the coupling without reaching forward and holding the broom in the position in which he held it when he fell; and that the broom was a short one, which he used in cleaning the shafting over the mules.

On cross-examination the plaintiff testified that he reached out farther than he thought, and lost his balance and fell; that he had never cleaned the coupling from the running board before; and that he had used this running board once or twice a week ever since he had been there.

On the question of the negligence of the defendant, the plaintiff offered to show that the machinery or ways furnished to the plaintiff in the performance of his work were defective, in being different from those usually furnished for a similar purpose under similar conditions in other like establishments, and in their incompleteness by reason of the absence of the rail at the end, or an extension of the running board to the limit of the place where the work was required to be done.

It was admitted that the machinery and ways had not been changed from the time they were placed in position, a period of more than one year. The judge excluded the evidence offered, and, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

J. L. Gillingham, for the plaintiff.

J. F. Jackson, for the defendant.

ALLEN, J. The accident to the plaintiff occurred by reason of his inadvertently stepping too near the end of the running board, in order to reach forward with his broom to clean the

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coupling, which was about six feet farther on. It seems to have been a pure inadvertence on his part, for which nobody was responsible but himself. He had long been familiar with the position and length of the running board, which was the same as at the time when he entered the defendant's employment. The defendant did not owe to the plaintiff any duty to change it. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. The offered proof, that the arrangement was different from that usually furnished in other like establishments, was properly excluded. *Exceptions overruled.*

ATTORNEY GENERAL *vs.* JOHN DROHAN & others.

Suffolk. September 7, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Quo Warranto — Title to Membership in Political Committee — Amendment — Change of Parties — Statute — Ballot Commissioners of Boston.

Membership in a political committee belonging to a political party is not a public office, and an information in the nature of a *quo warranto* will not lie to try the title.

Relators, whose rights could not be determined by an information in the nature of a *quo warranto*, having filed a motion to amend the information by striking out the name of the Attorney General and inserting their own names, so that they might be the sole parties plaintiff, the court, assuming that such an amendment would be allowed, with other amendments, if any, that might be necessary, proceeded to consider the questions which thus would be presented, speaking of the relators thenceforward as the plaintiffs.

By St. 1896, c. 485, § 4, which gives the election commissioners of Boston authority to recount the ballots cast at a caucus, it is intended that, in case of the disputed election at a ward caucus of a member of a political committee, the action of the commissioners on a petition for a recount shall settle the question as to who is elected.

INFORMATION, in the nature of a *quo warranto*, filed July 13, 1897, by the Attorney General, to try the title to membership in the Democratic City Committee of the city of Boston. Hearing before *Lathrop*, J., who reserved the case upon the information, answer, and an agreed statement of facts, for the

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consideration of the full court. The facts appear in the opinion.

J. B. Goodrich, (*T. J. Kenny* with him,) for the plaintiff.

J. A. Dennison, for the defendants.

MORTON, J. The first question is whether the relators, as members of the Democratic City Committee of Boston, hold public offices. If they do not, this information cannot be maintained, since the Attorney General can intervene in matters of this nature only so far as they relate to public offices. For any interference with their private rights, the remedy of the relators is by proceedings in their own names against the parties in possession of the offices to which they claim to have been elected. *Commonwealth* v. *Dearborn*, 15 Mass. 125. *Kenney* v. *Consumers' Gas Co.* 142 Mass. 417. *Attorney General* v. *Sullivan*, 163 Mass. 446, 448. *Attorney General* v. *Clark*, 167 Mass. 201. *Attorney General* v. *Adonai Shomo Corporation*, 167 Mass. 424.

Except for the fact that several acts have been passed by the Legislature which relate, amongst other things, to political committees, no one would contend, we presume, that the members of a political committee belonging to one of the political parties hold public office by reason of their being members of such committee. We do not think that the effect of these statutes has been or is to make that a public office which was not one before their enactment. Without attempting an exhaustive definition of what constitutes a public office, we think that it is one whose duties are in their nature public, that is, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested, either as members of the entire body politic, or of some duly established division of it. *Brown* v. *Russell*, 166 Mass. 14. *United States* v. *Hartwell*, 6 Wall. 385. *People* v. *Nostrand*, 46 N. Y. 375. *People* v. *Brooklyn*, 77 N. Y. 503. *Opinion of the Justices*, 3 Greenl. 481.

A distinction has been taken between public office and public employment to which it is not necessary now to do more than to refer. *Brown* v. *Russell*, *ubi supra*. Manifestly, membership in a political committee belonging to one party or another does not come within the above description of what constitutes public

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office. The fact that the Legislature has deemed it expedient to regulate by statute the election and conduct of political committees does not make the office a public one. The members of them continue to be, as before, the officers of the party which elects them, and their duties are confined to matters pertaining to the party to which they belong, and which alone is interested in their proper performance.

Neither is it necessary, in order to protect the rights of members of political committees, that the office should be regarded as a public one. As already observed, that may be done by proceedings instituted in their own names by those whose rights have been interfered with, and this court and the Superior Court are expressly given full powers at law and in equity to enforce the provisions of the statutes relating to political committees and caucuses.

We think, therefore, that the rights of the relators cannot be determined in this form of proceeding. The relators have, however, filed a motion to amend the information by striking out the name of the Attorney General and inserting their own names, so that they may be the sole parties plaintiff; and assuming that such an amendment will be allowed, with other amendments, if any, that may be necessary, we proceed to consider the questions which thus will be presented, speaking of the relators henceforward as the plaintiffs.

The defendants and the plaintiffs both claim to have been elected at the same caucus. No question arises concerning the regularity of the proceedings relating to the calling of it, or to its organization. It appears from the agreed facts, that at the caucus the plaintiffs "were declared elected members of the Democratic Committee of Ward 16, and within three days thereafter were each presented a certificate of election to said Democratic Committee of Ward 16 by the warden and clerk of said caucus." By statute, the members of the several ward committees of a political party in a city constitute a committee called a city committee. St. 1895, c. 489, § 4. By their election, therefore, as members of the Democratic Committee of Ward 16, the plaintiffs became members of the Democratic City Committee of Boston. The day following the caucus, ten legal voters of the ward petitioned the election commissioners of Boston, as they

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had the right to do, (St. 1896, c. 435, § 4, and St. 1895, c. 507, § 23,) for a recount, alleging that another ticket had received more votes than that which bore the names of the plaintiffs. Thereupon the commissioners recounted the ballots, "and determined the questions raised in said petition, and reported to the president of the Democratic City Committee that by their recount of said ballots no material change appeared from the count as declared by the said warden and clerk of said caucus." At this recount, parties representing the respective tickets on which were the names of the plaintiffs and defendants were present, as it is provided by statute that they could be, and "addressed the commission on the subject matter of the aforesaid petition." Shortly afterwards, at a meeting of the Democratic City Committee, duly called and assembled, the plaintiffs appeared and participated in the temporary organization of the committee, and the defendants then objected to the admission of the plaintiffs as members of the committee for the reasons set forth in a communication filed with the secretary of the committee. Thereupon the committee voted to give each side an opportunity to present its case, and at the conclusion of the hearing, against the protest of the plaintiffs, seated the defendants as members of the committee. Pursuant to and following this action of the committee, its secretaries filed with the Secretary of the Commonwealth, and with the board of election commissioners of the city of Boston, and with the secretary of the State committee of the political party of which they were a portion, a list of the members of the Democratic City Committee of Boston for the year beginning June 1, 1897, which included the names of the defendants, instead of including, as the plaintiffs contend it should have, their names. No objection existed to the eligibility of the plaintiffs up to the time of the caucus, and of the meeting of the city committee, so far as their right to participate in the caucus or be elected to the committee was concerned.

The statute which gives the election commissioners of Boston authority to recount the ballots cast at a caucus provides that they shall "recount said ballots and determine the questions raised; and such recount shall stand as the true result of the vote cast in such caucus." St. 1896, c. 435, § 4.

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The question is, What is meant by "the true result"? The defendants contend that the commissioners are to determine only who received the most ballots, and that the committee is the final judge of its own membership. We think that this is not the true construction. The words "shall stand as the true result" import not only a correct count, but something more, — an element of finality.

A representative body made up of members chosen by or selected from a constituency which they represent is usually either expressly or from the nature of the case the judge of its own membership. But it was competent for the Legislature to provide, as we think it has done in effect, that, in case of the disputed election at a ward caucus in Boston of a member of a political committee, the action of the election commissioners on a petition for a recount should settle the question as to who was elected. This construction is supported, we think, by other instances, in which like language has been or is used with the intention, it would seem, that the recount should be final. Thus it was provided by St. 1893, c. 417, § 210, that the recount by the board of aldermen of a city, or of a committee thereof, of the ballots cast upon the question of granting licenses for the sale of intoxicating liquors, "shall stand as the true result of the vote cast in such city upon the said question." This section was repealed by St. 1895, c. 299, § 8, and § 1 of the last named act was substituted for it, and contains the same language. When this language is compared with that describing the effect of action under St. 1893, c. 417, § 207, we think that it is still more apparent that the recount by the election commissioners was intended in a case like the present to be final. The same language which we have been considering is used in St. 1897, c. 530, § 12, which was enacted after the election in question, and which is a repeal of and substitute for St. 1896, c. 435, § 4. This statute expressly gives to the election commissioners the power to decide upon challenged votes, and thus removes any doubt, we think, respecting the finality of the recount, and shows that the meaning which we have given to the language under consideration is the correct one, since it hardly is to be supposed that the Legislature could have intended to use the same words in different senses in the two statutes.

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It is true that there is no way provided for notifying the result to the city committee, but all parties interested are bound to take notice of it.

The fact that the election commissioners are required to retain for three months all ballots cast at a caucus, and to "produce the same if called for by any court, justice, tribunal, or convention having jurisdiction of the same," (St. 1895, c. 507, § 22,) does not control, we think, the express language of the statute in regard to the effect to be given to a recount. If no recount should be asked for, then it would be necessary that the question who was elected should be determined, in case of a dispute, in some other manner; and, with that contingency in view, the Legislature well may have directed that the ballots should be retained, and should be produced before the convention, tribunal, justice, or court with which the decision would rest.

It follows, therefore, that in the contingency which has arisen the rule under which the city committee purported to act in seating the defendants did not justify their action, and that the plaintiffs are entitled to the offices to which they claim to have been elected.

Information in its present form to be dismissed, unless an amendment is allowed substituting the relators as plaintiffs, when a decree may be entered for the plaintiffs.

MARY McMAHON *vs.* EAGLE LIFE ASSOCIATION.

SAME *vs.* RED MEN'S FRATERNAL ACCIDENT ASSOCIATION OF AMERICA.

Hampden. September 28, 1897. — November 24, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Beneficiary Association — Foreign Judgment — Conclusiveness in Action here.

The determination, by a court of general jurisdiction of another State, of the meaning of a contract and of the proper form of remedy, is conclusive upon this court in an action here upon the judgment.

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TWO ACTIONS OF CONTRACT, upon judgments rendered by the District Court of the Third Judicial District of Nebraska, in actions on certificates of membership issued by the defendants respectively to John C. McMahon, and payable in case of death to the plaintiff. The cases were tried together in the Superior Court, without a jury, before *Gaskill*, J., who found for the plaintiff in each case; and the defendants alleged exceptions. The facts appear in the opinion.

H. W. Ely, for the defendants.

D. Malone, for the plaintiff.

ALLEN, J. These are actions upon judgments rendered by the District Court of the Third Judicial District of Nebraska. The defendants appeared by counsel in that court, and filed their answers, and the cases were tried. Without denying the general jurisdiction of the court over the subject and over themselves, they contended that the amounts to be paid to the beneficiary under their respective certificates should not exceed in any case the amount realized by them from one assessment made upon all the members assessable at the death of the person insured; but it was determined otherwise. The defendants also moved to set aside the verdicts, on the ground that they were for too large sums; but the motions were overruled. The defendants do not now deny that the court was a court of record with general jurisdiction; but while conceding that they were properly before the court, and that the court had general jurisdiction over the kind of subject involved in the litigation, they contend that, under their certificates or policies which were sued on, they were not liable to actions at law to recover fixed sums as damages, but only to a process to compel them to levy assessments, and that such a process would not be within the jurisdiction of the courts of Nebraska, the defendants not being incorporated in that State. This question involved the construction of the contracts upon which the defendants were sued, and the decisions against them were decisions upon the merits. We cannot now revise those decisions. In the absence of evidence to the contrary, there is a presumption that the court, being a court of general jurisdiction, had the jurisdiction which it assumed to exercise in these cases, which were actions at law to enforce contracts. *Buffum* v. *Stimpson*, 5 Allen, 591. *Knapp* v.

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Abell, 10 Allen, 485. *Folger* v. *Columbian Ins. Co.* 99 Mass. 267, 273. *American Tube & Iron Works* v. *Crafts*, 156 Mass. 257. *Kelley* v. *Kelley*, 161 Mass. 111. Freeman on Judgments, § 565. The jurisdiction to construe and enforce contracts is within the ordinary powers of a court of general jurisdiction; and the determination of the meaning of the contracts of the defendants, and of the proper form of remedy, is conclusive upon us, so far as the present actions are concerned.

Exceptions overruled.

LOUIS BEIQUE *vs.* JOHN R. HOSMER.

Hampden. September 28, 1897. — November 24, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence — Action — Employers' Liability Act — "Ways, Works, or Machinery."

An experienced workman in the employ of a subcontractor, who is doing the carpentry in the construction of a building, cannot maintain an action against his employer for injuries sustained by falling through a hole cut in one of the floors, under the authority of the general contractor, by another subcontractor, for the purposes of his work in concreting the basement, on the ground that the defendant, who knew that the hole was there, ought to have guarded it or warned the plaintiff of it.

A building in the process of erection is not a part of the "ways, works, or machinery" of a subcontractor, who is engaged in a portion of its construction, within the meaning of the employers' liability act, St. 1887, c. 270, § 1, cl. 1.

TORT, for personal injuries received by the plaintiff while in the defendant's employ. The declaration contained three counts; the first at common law, for negligently putting the plaintiff to work in an unsafe place; and the second and third counts, under the employers' liability act, St. 1887, c. 270, alleging a defect in the ways, works, or machinery of the defendant, and the negligence of a person in the defendant's service, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence.

Trial in the Superior Court, before *Dewey*, J., who reported

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the case for the determination of this court, in substance as follows.

The plaintiff was an experienced carpenter, and had been employed by the defendant for several months prior to the accident, which happened on November 12, 1895. The defendant had a contract to do the carpentry upon an addition to the Lyman Mills in Holyoke, under one Dodge, who was the general contractor; and one Prew had the contract for concreting the basement of the building. About six or eight weeks before the accident, Prew cut a hole through the covering of the first floor of the building, near the centre of the floor, for the purpose of getting through the materials for the concreting of the cellar. The cutting of this hole was authorized by Dodge. At about seven o'clock on the night of the accident, the defendant's superintendent told the plaintiff and another workman that it was necessary to put in some windows on the first floor, and they proceeded down stairs from the floor above, the superintendent leading the way with a lighted lantern. Upon reaching the lower floor the superintendent was called away, and left his lantern there. The plaintiff then started to go across the floor and get the window sashes to put in place, and fell through the hole, sustaining the injuries complained of. The plaintiff testified that the superintendent told him to "go and get the windows"; that it was rather dark there; and that he did not know of the existence of the hole. The defendant and his superintendent each testified that they knew that the hole was in the floor for several weeks before the accident; and the latter also testified that, during that time, he had sometimes seen the plaintiff around the hole.

At the close of the evidence, the judge, at the defendant's request, directed the jury to return a verdict for the defendant. If the case should have been submitted to the jury, it was to stand for trial; if the ruling was correct, judgment was to be entered on the verdict.

W. Hamilton, (*W. H. Brooks* with him,) for the plaintiff.

J. B. Carroll, (*W. H. McClintock* with him,) for the defendant.

MORTON, J. The hole through which the plaintiff fell was not cut by the defendant, or by his direction, or that of any one in his employ. It was cut by one Prew, under authority from

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one Dodge, the general contractor, for purposes connected with Prew's work, and not with that of the defendant. If therefore there was any negligence on the part of the defendant or of his superintendent, it was not in causing the hole to be cut. It appears, however, that the defendant and his superintendent knew for several weeks before the accident that the hole was there, and it is said that they should have covered or guarded it, or have warned the plaintiff of it.

The plaintiff was an experienced workman. The building on which he was working was in the process of construction. Obviously, the condition of such a building is not a permanent one, but is liable to change as the necessities of construction require. An experienced workman must be assumed to know this, and to have regard to it. It is one of the risks of the business in which he is engaged. To require his employer to warn him or to guard him against such a risk would be, therefore, to compel the employer to protect him from a risk concerning which, from the very nature of the case, the employer would have no reason to suppose that the workman needed any warning or protection. *Kanz* v. *Page*, 168 Mass. 217. *McCann* v. *Kennedy*, 167 Mass. 23. *Hogarth* v. *Pocasset Manuf. Co.* 167 Mass. 254. Though the hole had been there several weeks, there is nothing to show that the defendant had any reason to suppose that the plaintiff needed any warning or protection in regard to it.

We think that the building was not "ways, works, or machinery connected with or used in the business" of the defendant, and that therefore the hole did not constitute a defect in the ways, works, or machinery of the defendant. *Lynch* v. *Allyn*, 160 Mass. 248. When completed, the building would no doubt constitute a part of the ways, works, or machinery of the Lyman Mills, for which it was being erected, but while in the process of erection it could not be said, we think, to be a part of the ways, works, or machinery of a subcontractor who was helping to build it.

Exceptions overruled.

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MICHAEL SCULLANE *vs.* FREDERICK T. KELLOGG & another.

Hampden. September 28, 1897. — November 24, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Employers' Liability Act — Master and Servant — Negligence — Due Care — Assumption of Risk — Law and Fact — Damages.

In an action for personal injuries sustained by the plaintiff, while in the defendant's employ, by an elevator coming down upon him while he was picking up some papers which had been spilled from an upper story of the building on the bottom of the elevator well, if the defendant's superintendent sent the plaintiff there to do this work, and promised to look out for him while he was so engaged, the plaintiff is entitled to go to the jury upon the questions of negligence on the part of the superintendent, of due care on his own part, and of his assumption of the risk.

In an action for personal injuries sustained by the plaintiff, while in the defendant's employ, by an elevator coming down upon him while he was picking up some papers which had been spilled from an upper story of the building on the bottom of the elevator well, there was some evidence tending to show that the plaintiff had been responsible for the upsetting of the paper; that the defendant's superintendent came to the place where this had happened, and saw the plaintiff and others at work picking up paper; that his purpose was to have the entire matter remedied before he went away; that he knew that some of the paper had been spilled down the elevator well, and that the plaintiff was the person who had spilled it; that he knew that somebody would have to go down stairs and pick up the paper in the well; that he saw the plaintiff go off; that the plaintiff went down stairs and began to pick up the paper in the well; and that after some minutes, and before the superintendent himself went down stairs, the elevator was lowered and came down upon the plaintiff while he was at work there. *Held*, that there was sufficient evidence to entitle the plaintiff to go to the jury upon the question of the superintendent's negligence.

Although there is no distinct proof, in an action for personal injuries, of the amount of the expenses of the plaintiff's sickness or medical attendance, if it appears that a physician treated him eight times at the plaintiff's house and eleven times at his own office, an allowance by the jury of forty dollars is reasonable.

TORT, for personal injuries sustained by the plaintiff while in the defendant's employ. The third count of the declaration, upon which the case was submitted to the jury, was under the employers' liability act, St. 1887, c. 270, alleging negligence of some person in the defendant's service, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence.

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Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that, in February, 1896, he entered the employ of the defendants, who were envelope manufacturers; that he was a general workman, taking care of the paper in the room and bringing it up stairs; that the accident occurred on April 9, 1896, in the morning; that there was a steam elevator which ran from the basement to the top of the building; that on the morning of the accident there was a truck load of paper called flats dumped from the machine room floor, part of it on the elevator and part of it down the elevator well; that the paper came from the cutter on the machine room floor, which was the fourth floor from the cellar, there being five floors in the building; that the plaintiff and one Carney started to pick up the paper that was dumped on the elevator, and one Schofield, who, it was agreed, was the defendants' superintendent, "came around"; that "Schofield told me I would have to go down stairs and pick up that paper and straighten it out; he said I would have to go down into the elevator and straighten that paper out; I told him I would; I asked him if he would look out for me, and he nodded his head; I then went down there and started to pick up the paper"; that he went down into the basement and walked into the elevator well, the door of which was open, and began to pick up the paper, of which there were a good many thousand sheets, which were scattered over the bottom of the elevator shaft; and that he had been working there ten or fifteen minutes when the elevator came down upon him, and he received the injuries complained of.

On cross-examination, the plaintiff testified that he did not know whether, when Schofield told him to go down and pick up the paper, he spoke so that anybody could hear him or not; that he did not think that anybody else was around there at the time; that he was accustomed to use the elevator, but did not use it on this occasion because somebody else wanted to use it, and so he walked down the stairs into the basement; and that he did not see or hear the elevator, and had no warning that it was coming down.

Thomas H. Tracy testified that he was a physician and attended the plaintiff professionally after the accident; and that

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he treated him eight times at the plaintiff's house and eleven times at his own office.

Thomas Eagan testified as follows: "On the day of the accident I was working for the defendants, and my business was to carry stuff up and down stairs on this elevator; after the paper had been spilled off the truck I took the elevator from the floor where the paper was dumped and started down to the basement to get something; when I got within three or four feet of the basement floor, I heard some one hallo, and I stopped the elevator and jumped off; the elevator was stopped about three feet from the basement floor; the plaintiff got out and I went up stairs: at the time I took the elevator from the third floor, I did not see Mr. Schofield around there anywhere; I had no notice that the plaintiff was down in the cellar."

Harry Schofield testified, among other things, as follows: "At the time of the accident I was employed by the defendants as general superintendent of the factory; the flats were spilled on the third story; I came down stairs to the third story; came along by the wall and walked over to the elevator. I saw the plaintiff, with Miss Mahany and Carney, working around the elevator, picking up flats which had been spilled from the truck; I could see this as I walked along; as I came along and got perhaps within fifteen or twenty feet of the people there, I saw the plaintiff get up, walk around the wall there, which was built out into the room; I saw him go around that wall; I saw what had happened. I then went along to this archway to the cutters, to a man by the name of Goddard; in consequence of what I said to Goddard, he came out with me; after we got out there, we went to work and took the flats off the elevator, and then we commenced to pick them up off the floor, get them on to this truck, and Goddard and Carney then went to work and commenced to jack them up on this truck. Then I went off to get off some orders, regular business; after I had done this business I came back again. I said something to Carney, in consequence of which he and I started on the elevator to go down cellar to pick up the flats that were in the well; the elevator at that time was on a level with the third floor; I did n't know that the plaintiff had gone down to pick up the flats; I had n't spoken to him, and he had n't spoken to me at that time; Goddard got

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on of his own accord; we went down and picked up what flats there were. I saw the plaintiff down there standing in the middle of the floor, a little back, rubbing his shoulder; I asked him what the matter was, and he said he got squeezed under the elevator; I asked him what he was doing under there; he said he was picking up those flats, and that was about all that was said. If a man is down in the elevator well where the plaintiff was, picking up these flats, when the elevator is coming down, and gets so that the elevator platform is even with the floor joists just above the cellar floor, that cuts the light off from the upper story in the elevator well; with reference to what other way a man could tell whether the elevator was coming down or not, he could tell by the rope being pulled; if a man is in that elevator well and the elevator is up on some floor above him, the noise of the starting of the elevator would indicate that it was being started and its coming down."

On cross-examination, he testified: "On this particular day, I had been working on the fourth story when the flats were spilled, and I came down to the third story, and I saw then that the flats had been spilled; I went right straight toward the elevator; when I started down I did not go there with the purpose of seeing what the matter was, but as soon as I saw it, I did; my purpose was to have the entire matter remedied before I went away; I could n't say whether any had been cleaned out of the elevator before I got there; I knew who was in the habit of handling those flats; I did n't ask who it was that spilled those flats as soon as I got there."

"*Q.* You knew it was the plaintiff? *A.* He was there, and had charge of that business. — *Q.* And you knew that he was the one that had spilled the flats? *A.* Yes, sir. — *Q.* And you knew that flats had spilled down in the elevator well? *A.* Yes, sir. — *Q.* As a necessary consequence? *A.* Yes, sir."

He also testified as follows: "I saw the plaintiff go off. . . . I knew somebody would have to go down when I went away from there, at the end of seven or eight minutes, to pick those up in the well."

William Carney testified that he was in the employ of the defendants, and was helping the plaintiff on the day of the accident when the flats were spilled; that the plaintiff, with Annie

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Mahany and the witness, began picking up the flats; that he noticed that the plaintiff had gone away, although he did not see him go; that about the same time he saw Schofield coming towards the elevator; that he did not hear Schofield say anything to the plaintiff at any time; that Goddard came and assisted them in picking up the flats; that Schofield, Goddard, and the witness, by Schofield's direction, went down on the elevator to pick up the flats which were on the floor of the elevator well, and then found that the plaintiff had been injured: that there were about a thousand flats on the floor, and it took them only two or three minutes to pick them up; and that he did not see any that had been taken out before they got there.

Frank C. Goddard corroborated, in substance, the previous witness, and also testified as follows: "This elevator is a slow running, heavy freight elevator, and makes a great deal of noise as it runs; you can hear it quite plainly as it goes up and down: you can see the rod move down in the bottom of the elevator well when the elevator is started or stopped; when the elevator is going down, and gets even with the floor above the basement, it shuts off the light which comes into the elevator well from the elevator door at that floor, and a person standing in the elevator well could see that the elevator was coming down by the shutting off of the light."

Thomas Moriarity testified, among other things, as follows: "On the day of the accident I was working for the defendants, and was engaged in making size in the basement at the time that the plaintiff came down; he took a banana from his pocket, peeled it and ate it, and we stood there talking together for about ten minutes before he went into the elevator well; the first thing I heard after that was somebody hallo, and I looked around and I saw the plaintiff under the elevator; there were about a thousand flats in the bottom of the elevator well, and it would only take two or three minutes to take them out and jog them."

Annie Mahany testified as follows: "I was employed by the defendants; on the day of the accident I saw the flats slide off the truck that the plaintiff and Carney were putting on to the elevator; I went there to help pick them up, and a little while after I had got there I saw Mr. Schofield coming toward the

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elevator from the direction of the stairs that lead up stairs; as he was going toward the elevator, the plaintiff started away; Mr. Schofield was about fifteen feet away from the elevator when the plaintiff started away; Mr. Schofield did not say anything to the plaintiff that I heard."

At the conclusion of the evidence, the defendants requested the judge to rule as follows:

"1. There is no sufficient evidence that the superintendent, Schofield, was guilty of any negligence for which the defendants are liable, which caused or contributed to the plaintiff's injury. 2. If the jury find that the superintendent, Schofield, did not have the conversation with the plaintiff which the plaintiff says he did, in which he promised the plaintiff that he would look out for him, then there is no sufficient evidence that Schofield was guilty of any negligence which would render the defendants liable in this action. 3. Upon the pleadings and evidence, the plaintiff is not entitled to recover, because he himself was not in the exercise of due care. 4. Upon the pleadings and evidence, the plaintiff is not entitled to recover, because his injury was caused by one of the risks of the employment which he voluntarily and appreciatingly assumed. 5. Nothing can be recovered for expenses of sickness or medical attendance."

The judge refused to rule as requested.

The jury returned a verdict for the plaintiff in the sum of seventy-six dollars, of which forty dollars was for medical attendance; and the defendants alleged exceptions.

W. Hamilton, (*W. H. Brooks* with him,) for the defendants.

W. H. McClintock, (*J. B. Carroll* with him,) for the plaintiff.

ALLEN, J. The first, third, and fourth requests for instructions were rightly refused. The jury might find from the plaintiff's testimony that the defendants' superintendent had virtually promised to look out for him while he was picking up the paper in the elevator well; and if such promise had been given, the plaintiff was entitled to go to the jury upon the questions of negligence on the part of the superintendent, of due care on his own part, and of his assumption of the risk. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 535.

A more doubtful question arises upon the second request. This request does not touch the question of the plaintiff's due

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care, or of his assumption of the risk, but it presents the question whether, in the absence of any promise by the superintendent to look out for the plaintiff, there was any sufficient evidence of his negligence. Upon consideration, we think there was sufficient evidence to entitle the plaintiff to go to the jury on this question, even omitting the testimony of the conversation. That is to say, there was some evidence tending to show that the plaintiff had been responsible for the upsetting of the paper, that the superintendent came to the place where this had happened and saw the plaintiff and others at work picking up paper, that his purpose was to have the entire matter remedied before he went away, that he knew that some of the paper had been spilled down the elevator well and that the plaintiff was the person who had spilled it, that he knew that somebody would have to go down stairs and pick up the paper in the well, that he saw the plaintiff go off, that in point of fact the plaintiff went down stairs and went to work picking up the paper in the well, and that after some minutes, and before the superintendent went down, the elevator was lowered and came down upon the plaintiff while he was at work there. The jury might infer from this evidence that the superintendent knew or supposed that the plaintiff had gone down to do that which he actually did; and they might think that he ought to have taken some precautions to prevent the elevator from being let down upon the plaintiff. On the whole, the court might properly refuse to give the second instruction.

The fifth request was also properly refused. Although there was no distinct proof of the amount of the expenses of sickness or medical attendance, yet, in view of the evidence as to the physician's services, the jury might allow a reasonable sum. In a proper case, even unascertained future expenses may be allowed for. *Turner* v. *Boston & Maine Railroad*, 158 Mass. 261, 267.

Exceptions overruled.

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ARTHUR B. DAVIS *vs.* INHABITANTS OF LONGMEADOW.

Hampden. September 29, 1897. — November 24, 1897.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Defect of Highway — Negligence — Due Care — Death of Horse — Question for Jury.

Where, in an action to recover damages for the death of a horse caused by an alleged defect in a highway, the question is whether the death was a consequence sufficiently direct and immediate to enable the plaintiff to recover, assuming that the way was defective, and that the person in charge of the horse was in the exercise of due care throughout the whole occurrence, if it appears that the driver reasonably thought that he could get through the mud-hole where the accident occurred, and used due care in making the attempt, and after getting stuck in the mud at once made reasonable efforts to extricate the team therefrom, with the help of an additional horse, and having reason to think he could get through, and during this attempt the plaintiff's horse burst a blood-vessel and soon after died, the plaintiff is entitled to go to the jury.

TORT, to recover damages for the death of a horse, caused by an alleged defect in a highway in the defendant town.

At the trial in the Superior Court, before *Lilley*, J., there was evidence tending to show that the horse at the time of the accident, which occurred on April 17, 1896, was in good condition, and was attached with his mate to a loaded wagon; that at a point in the highway on Old Clay Hill, so called, there was a mud place, consisting of a thick clay mud, extending about two rods and the full width of the travelled part of the highway, which was in that place about twenty-five feet; that this thick mud would, by gradual settling of the wagon, take in a heavy wagon and load to the distance of from one and a half to two feet; that the team in question attempted to drive through the place in very nearly the middle of the twenty-five feet travelled way, in about the tracks of a lighter loaded team that had just succeeded in getting through the place, and at a place that seemed to the driver of this team, and to other witnesses who were on the spot at the time, as good a track or part of the road as could have been selected for getting through that place, and that the driver reasonably thought that he could get through; that the

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wagon, the horses being driven with due care, stopped from the heaviness of the road, when all four wheels of the wagon had entered the mud place and the horses were also in it; that the driver of the lighter loaded team unhitched one of his horses, and took it back and hitched it to the neap of the wagon in the mud; that they then tried the three horses once or twice — most of the witnesses saying twice — to see if they could draw the wagon through the place, but did not succeed; that the drivers spoke to the horses without using the whip to try the load, and the horses pulled as hard as they could; that at the time the attempt was made the wagon was not in very deep, but went deeper nearly to the axletrees; that the horse in question, being deeper in than his mate, was in when the effort was made a little over the ankles, and then sank to his knees; that the drivers reasonably thought that they could get the team through the mud, and that they did not know the real depth of it further than as revealed by the depth to which the horse and wagon had gone before the effort to draw the wagon out; that after the attempt the horse in question, by a strong effort, raised himself up apparently to secure a better footing, when he lost his footing and fell to the road; and that he was at once unharnessed and helped to get up, when he showed signs of having been injured, and died of rupture of a blood-vessel within forty-five or fifty minutes.

There was also evidence that the place could have been remedied by shovelling out, from any given width of the road, the clay and mud to the depth of one foot, and putting in its place sand to the depth of about one foot.

Upon the request of the defendant, the judge ruled that the plaintiff was not entitled to recover, and directed a verdict for the defendant, and at the request of the parties reported the case for the determination of this court. If the ruling was correct, judgment was to be entered upon the verdict; otherwise, the case was to stand for trial.

W. R. Heady, for the plaintiff.

C. L. Long, for the defendant.

ALLEN, J. It has often been held that cities and towns are responsible only for the direct and immediate loss occasioned by a defective highway. *Raymond* v. *Haverhill*, 168 Mass. 382.

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Jenks v. *Wilbraham*, 11 Gray, 142. *Marble* v. *Worcester*, 4 Gray, 395. The question in this case is, whether the death of the plaintiff's horse was a consequence sufficiently direct and immediate to enable the plaintiff to recover, assuming that the way was defective, and that the person in charge of the horse was in the exercise of due care throughout the whole occurrence. Upon the facts reported, we think the plaintiff was entitled to go to the jury. If the driver reasonably thought that he could get through the mud-hole, and used due care in making the attempt, and after getting stuck in the mud at once made reasonable efforts to extricate the team therefrom, with the help of an additional horse, and having reason to think he could get through, and during this attempt the plaintiff's horse burst a blood-vessel and soon after died, this should be deemed a direct and immediate consequence of the defect in the road. The driver had a right, if it was not his duty, to do what he reasonably could to get the team out from the mud-hole. He acted promptly and at once. It was, in effect, but one incident. *Tuttle* v. *Holyoke*, 6 Gray, 447. *Stickney* v. *Maidstone*, 30 Vt. 738. *Page* v. *Bucksport*, 64 Maine, 51. *Chicago* v. *Schmidt*, 107 Ill. 186. *Case to stand for trial.*

JEROME MARBLE & others *vs.* STANDARD OIL COMPANY.

Worcester. October 4, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Contract — Breach — Indefiniteness — Termination.

There is no evidence in this case of the breach of any contract alleged in the declaration.

A conversation between the seller and buyer of goods, which contains nothing more definite than an agreement that the seller will deal with the buyer in such a way as to protect his trade, discloses an arrangement which is too indefinite and too general to be enforceable as a contract.

Open and notorious acts by one party to an agreement, known to the other, which are inconsistent with the longer continuance of it, may be considered a termination of it, if it was to continue only during the pleasure of the parties and called for no formal notice to terminate it.

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CONTRACT, in five counts. The first count alleged an agreement by the defendant not to interfere with the plaintiffs' sale of oil in Worcester and its vicinity, by itself selling certain brands named within the same territory, from tank wagons or otherwise, to retailers and consumers of the defendant's oil. The second count alleged an agreement by the defendant to sell the plaintiffs all kinds of refined oils at such a price as to make the price to the plaintiffs one fourth of a cent per gallon less than the price at which it should sell the same quality of oil to E. T. Smith and Company, the plaintiffs' competitor. The third count alleged an agreement by the defendant not to interfere with the plaintiffs' trade, nor sell nor offer for sale refined oils to persons or corporations who were customers of the plaintiffs. The fourth count alleged an agreement by the defendant to pay the plaintiffs one fourth of a cent per gallon for all oil which the defendant should sell to any of the customers of the plaintiffs. The fifth count alleged an agreement by the defendant not to interfere in any manner with the plaintiffs' trade in connection with a certain brand of oil, nor to sell or offer for sale this particular brand to any of the plaintiffs' customers, so long as the plaintiffs continued to sell such brand. The consideration stated in the several counts were substantially that the plaintiffs would purchase all their kerosene or refined oil, or purchase exclusively oil of the defendant, and sell their customers only oil purchased of the defendant. All the counts alleged breaches by failure to perform the respective agreements.

Trial in the Superior Court, before *Hopkins*, J., who reported the case for the determination of this court, in substance as follows.

Joseph R. Marble, called as a witness by the plaintiffs, testified that he was a member of the firm of Jerome Marble and Company, and a plaintiff in this case; that he entered the firm as a partner in 1886; that he was a salesman for the firm on the road in 1884; and that at that time the sales business of the firm in the petroleum line covered every town or station, and some towns two miles from the stations, on the Boston and Albany Railroad east from Worcester as far as Newton, and went as far as Woonsocket, Rhode Island, including that city, on the Providence and Worcester Railroad; as far as Dan-

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sonville, Connecticut, on the Norwich and Worcester Railroad; as far west as Adams on the Boston and Albany Railroad and its branch, leaving out Springfield; on the Ware River Railroad up to and including Winchendon; on the Athol branch of the Boston and Albany Railroad up to and including Athol; and including also all towns between Worcester and Fitchburg and between Worcester and Ayer on the Worcester and Nashua Railroad, and taking in Shrewsbury and Leicester and other towns not reached by railroads.

The examination of the witness was then continued as follows:

"*Q.* Do you know who was the representative in fact of the Standard Oil Company in New England — in Massachusetts or Rhode Island — at the time I mention? *A.* I do. — *Q.* Who was that person? *A.* George B. Burton. — *Q.* Of where? *A.* Of Providence. — *Q.* Did you have any conversation at or about the time I allude to, and either before or after you were a member of the firm, with Mr. Burton, with regard to furnishing oil to Jerome Marble and Company? *A.* I did."

The witness further testified that the conversation was in the latter part of 1884, — he could not state accurately, — at the office of the defendant in Providence, Burton's office; that he had known him as a representative in fact of the defendant during 1884 and up to the time of his withdrawal, which was before the commencement of this action; and that he had known Burton in that position from 1884 to 1892, to the best of his knowledge and belief.

The witness was then further interrogated as to this and other conversations with Burton, and he testified as follows: "He said, 'This is a nice arrangement for your people; you must be very careful to keep the matter of the price quiet; E. T. Smith and Company must not understand that we sell you at less price.' I said, 'Is the oil as good as that made by Luke, Holmes, and Adams? Will it stand 100 flash test?' He said, 'What do you want to know for? 110 fire test is perfectly good.' I said, 'Our city inspector, Mr. Brophy, is very particular, and insists on 100 flash test.' Soon after this, within three months, I had another conversation at Providence. Burton said, 'How are things working in Worcester?' I replied, 'Fairly well; the great thing is to keep the quality of the oil

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right.' He said, 'The Standard Oil Company can make oil as well as any one. We have arranged about the 100 flash test. Brophy is too particular; be very careful not to say a word about the quarter of a cent a gallon that you have over E. T. Smith and Company. It would not do at all if that got out.'"

The witness also testified that subsequently he had talks with Burton frequently at his office, occasionally at Worcester, frequently on the cars, and once or twice in Boston; and continued as follows: "In 1887 I had a conversation with Burton in his office in Providence. I said, 'Mr. Burton, the price at which we are buying oil of you does not allow us to hold our trade in Athol. If it were not for this agreement with you by which we are to buy all our oil of you, we could buy oil of other parties and hold our trade in Athol.' He said, 'Under the agreement, you cannot buy oil of other parties; our arrangement is that you shall buy all the oil of us. We have all your trade, and we will protect you in your trade. Now, Athol is rather out of your territory; the Springfield people want that trade; you had better let them have it, holding your trade in Worcester under our agreement, by which you buy all your oil of us, and we will protect you in your trade, because we are also selling under the agreement one quarter of a cent less than E. T. Smith and Company; and, by the way, don't let that fact get out.' I replied that if that was the case we would yield the Athol territory. We did cease doing business there, we dropped out of Athol, which in itself was a large trade, taking several car loads per month. About the same time we had another conversation about the trade in the vicinity of Danielsonville, Connecticut. I said we ought to have a price low enough to hold that trade, and Burton said, 'The Standard Oil Company want Lee and Osgood to have that trade; we can get into Norwich by water more advantageously than we can by rail through Worcester.' I said that it was very hard for us to give up that trade, to give up any of our territory or trade, that it had cost us a great deal of time, money, and trouble to establish it. He replied, 'The tendency of trade is to localize. Under our agreement, by which you buy all your oil of us, and under which we give you a lower price than is given to E. T. Smith and Company, you are making more money, and will make more money in Worcester than if you try

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to fight Lee and Osgood in this territory.' I said, 'All right. We want to work in harmony with you as agreed upon.'

"I had a conversation with Burton in Boston, in the Boston and Albany Railroad station, in January or February, 1890, possibly in December, 1889, with reference to the sale of naphtha to the Worcester Gas Light Company. I said, 'You are not using us right to let the Maverick Oil Company take the trade of the Worcester Gas Light Company from us; we have worked it up, and held it at a small profit, reasonably expecting that you would continue to let us have it.' He said, 'That is all right; you 've had it and you 've made money on it. I do not do much with the naphtha business. You must not be too grasping. We are holding to the understanding arrived at with Mr. Drury and with you about the oil trade, and the Maverick Oil Works will have to have that business.' I said I thought it was not the right kind of treatment, but we should have to acquiesce. The last of the year 1889 in Providence I had a talk with Burton. I said, 'You are shipping us wretched oil into Clinton. We have no end of trouble with the water white oil.' He said, 'Well, the Standard Oil Company can make and will make the best water white oil on earth; we have had a little trouble; that oil is too heavy; you make the best settlement you can; you won't have to allow them very much.' I said, 'We could buy a great deal better oil of other people except for our arrangement with them.' Burton said, 'The Standard Oil Company will make oil as good as anybody, and the arrangement with us and you shall be to your benefit.' I said, 'I'll go back and make the best arrangement I can with the trade in Clinton.' I had conversations with Burton averaging once in three months."

The witness further testified as follows: "During any of the times mentioned the Standard Oil Company had no office or tank for doing business in Worcester. They established a place of business of that character in Worcester in 1891. Up to that time we bought our oil of them."

The examination of the witness was continued as follows: "*Q.* In any of the conversations you had with Burton at any time since 1884, was there anything said definitely about their selling oil? *A.* There was. — *Q.* Give the conversation. *A.* I said, 'Mr. Burton, a man in Fitchburg has built a tank station.'

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— *Q.* Did you mention the man's name? *A.* 'Mr. Cross of Fitchburg has built a tank station on the line of the Fitchburg Railroad tracks in Fitchburg. I think that would be a very good thing for us.' Burton said, 'Don't you do it; it is the most expensive way of handling oil; we never did it except as a last resort; the Standard Oil Company have built one in Nashua, and they wish they had not built it; you don't need it; your arrangement with us protects you now; you are handling your oil cheaper than you could if you put up a tank station; we never should build one in Worcester except as a last resort.' I said, 'Very well.' — *Q.* When was that? *A.* In 1886, as I remember it. — *Q.* Is that all that you can recollect that was ever said in any conversation with Burton touching their selling in Worcester? *A.* No. I said, 'You are building a tank station in Springfield?' — *Q.* When was that? *A.* I cannot fix the date: it was after the Fitchburg conversation. I should say within a year. I said, 'You are building a tank station in Springfield?' He said, 'Yes; things are all mixed up there; we are going to have that trade.' I said, 'You won't encroach upon our territory?' Burton said, 'No; the trade is being handled well in Worcester; we never expect to build a tank station there.'"

The witness was asked the following question: "I will renew my question regarding the establishment of sales from tank wagons in Worcester. At any time since their establishment of a tank here in 1891, has the Standard Oil Company put tank wagons on the road in Worcester?" This question was objected to. The judge excluded it; and the plaintiffs excepted.

The judge directed the jury to return a verdict for the defendant. If the direction was right, judgment was to be entered upon the verdict; otherwise, the verdict was to be set aside and a new trial ordered.

W. S. B. Hopkins, (*F. B. Smith & W. S. B. Hopkins, Jr.* with him,) for the plaintiffs.

F. P. Goulding, (*W. C. Mellish* with him,) for the defendant.

KNOWLTON, J. There was evidence that Burton was an agent who might bind the defendant by any proper contract for the sale of oil. If we assume, in favor of the plaintiffs, that some or all of the conversations relied on were in the course of his agency, so that they may be used in evidence against the

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defendant, we must consider what relations between the parties they tend to show.

In none of the counts of the plaintiffs' declaration is it averred that the plaintiffs have had or were to have the sole agency for the sale of the defendant's oils, or the exclusive right to sell them in Worcester or in any other place. One of the counts is upon an alleged contract by the defendant to sell all kinds of refined oils to the plaintiffs at a quarter of a cent per gallon less than the price at which it sold to E. T. Smith and Company, the competitors of the plaintiffs. From all the evidence introduced by the plaintiffs, we understand that they were selling oil through a large territory, covering all the towns and stations except Springfield on the Boston and Albany Railroad, and the branch lines under its control between Newton on the east and Adams on the west, including some towns two miles from stations; all towns on the Providence and Worcester Railroad to Woonsocket, Rhode Island, and all towns on the Norwich and Worcester Railroad as far as Danielsonville, Connecticut, and all towns between Worcester and Fitchburg and between Worcester and Ayer on the Worcester and Nashua Railroad, including Shrewsbury, Leicester, and other towns not reached by railroads. We understand from the testimony that the plaintiffs were selling in these places in competition with other persons, some of whom bought oil from the defendant, and some from other persons or corporations. The burden of proof was on the plaintiffs, and there is no testimony which indicates that this was not so. Indeed, one of the plaintiffs testified to conversations tending to show that there was a secret agreement between the plaintiffs and the defendant's agent that the price at which the defendant should sell to them should be a quarter of a cent per gallon less than that at which it was to sell the same kinds of oil to E. T. Smith and Company; and he also testified to conversations from which it expressly appears that the defendant was selling to other persons who were to resell in Athol, and to others who were to resell in the vicinity of Danielsonville, Connecticut. The plaintiffs complain that the prices which they were obliged to pay were too high to enable them successfully to compete with other persons to whom the defendant sold in those neighborhoods.

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The conversations relied on by the plaintiffs were nearly all in relation to the price and quality of oil sold to them by the defendant; and the only definite fact referred to in these conversations was the existence of an arrangement under which the defendant was selling to them at a quarter of a cent per gallon less than to E. T. Smith and Company. Beyond that there was nothing more definite than that the defendant would deal with them in such a way as to protect their trade; that is, sell to them on favorable terms, so that they could compete successfully with other parties selling in the same territory. If the arrangement in regard to the price as compared with the price paid by E. T. Smith and Company be treated as a contract, there is no evidence that there was ever a breach of it. As to the other part of the arrangement, we are of opinion that it was too indefinite and too general to be enforceable as a contract. It is manifest that the plaintiffs so considered it. When one of them complained to Burton, in 1889 or 1890, that the defendant was doing its business in such a way as to enable the Maverick Oil Company to take from them the trade of the Worcester Gas Light Company, which they had worked up, Burton replied that the Maverick Oil Company would have to have that business. The plaintiff testified, "I said I thought it was not the right kind of treatment, but we should have to acquiesce." So in the conversation with Burton, in 1886, in regard to building a tank station, Burton said that it was the most expensive way to handle oil, that the defendant had built one in Nashua and regretted it, and that they never would build one in Worcester except as a last resort. One of the plaintiffs said, "Very well." At this time the right of the defendant to build one in Worcester, if it chose, was asserted by the defendant's agent and acquiesced in by the plaintiffs. They built one five years afterwards. At another conversation within a year after the former one, the plaintiff said, "You won't encroach upon our territory?" Burton replied, "No; the trade is being handled well in Worcester; we never expect to build a tank station there." Here, too, the right to build a tank station in Worcester seems to have been asserted by implication, and not denied. The right of the defendant to sell to other parties in Worcester, who would sell in competition with the plaintiffs, seems never to have been ques-

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tioned. The contention of the plaintiffs is, that it had no right to sell to the plaintiffs' customers, or to interfere with their trade. But the conversation with Burton, in reference to building tank stations in Springfield, in Nashua, and in Worcester, implied that the building of a tank station naturally involved the opening of a retail business. If so, the recognized right to build a tank station included the right to sell at retail, even if it opened a new competition with the plaintiffs.

The plaintiffs did not show, nor offer to show, that the defendant ever sold, or tried to sell, to any of their customers. Putting road wagons on the road in Worcester was not necessarily inconsistent with carefully refraining from any interference with the customers of the plaintiffs, and with subjecting the plaintiffs to no more severe competition than they encountered before.

Moreover, there was no evidence that there was ever any agreement that the arrangement was to continue for any particular time. The plaintiffs were never bound to buy their oil from the defendant for a single day longer than they chose to. So far as appears, the arrangement was to continue only during the pleasure of the parties. It called for no formal notice to terminate it. There is no ground for a contention that it would continue in force after open and notorious acts by one party, known to the other, which were inconsistent with the longer continuance of it. The building of a tank station in Worcester, and the procurement of road wagons for sales at retail there, while the plaintiffs were living and doing business in that city, were acts of a notorious character, and were an expression of a purpose to terminate the arrangement, if there was an arrangement, not to sell oil at retail there. After the arrangement had come to an end, the defendant might sell as it chose. The only breach of an alleged contract that the plaintiffs offered to prove at the trial was the making of sales from the wagons after the construction of a tank station in Worcester.

We are of opinion that there was no evidence of liability under either of the contracts set out in the declaration.

Judgment on the verdict.

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EMMA F. CREED *vs.* JAMES E. GILMAN & others.

Worcester. October 4, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Trustee Process — Validity of Attachment of Funds in Hands of Trustee as against Third Persons.

A valid attachment by trustee process of funds in the hands of the trustee can only be made as against third persons by the service of the writ on the trustee by a duly authorized officer. The acceptance of service indorsed by the trustee on the writ is not sufficient.

TRUSTEE PROCESS. Writ dated July 9, 1895. The principal defendants were James E. Gilman and Frederick N. Cheney; and Hamilton Mayo, as executor of the will of Asula P. Goddard, was named as trustee. Judgment by default was entered against Cheney, and on July 10, 1895, Mayo indorsed his acceptance of service on the writ, and filed an answer. Cheney's assignee of "any and all balances of my [Cheney's] distributive share of and in the estate of the late Asula P. Goddard" appeared as claimant.

At the trial, before *Gaskill*, J., the plaintiff asked the ruling that the indorsement of service upon the writ by the trustee constituted a lien on the funds. The judge refused so to rule, and ruled that such an indorsement would not constitute a lien as against a third party, and found for the claimant. The plaintiff alleged exceptions.

T. B. Dunn, for the plaintiff.

H. Wheeler, for the claimant.

MORTON, J. We think that, as against the claimant, the acceptance of service by the trustee did not create a lien on the funds in his hands in favor of the plaintiff. An attachment valid as against third persons can be made only in the manner provided by law. It does not arise in such a case by consent of parties. The issuing of a writ does not create it. Something more is necessary. And that, we think, is the arresting of the debt in the hands of the trustee, which is effected by a service of the writ on him by a duly authorized officer. *Nelson* v. *Sir*

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born, 64 N. H. 310. *Edler* v. *Hasche*, 67 Wis. 653. *Epstein* v. *Salorgne*, 6 Mo. App. 352. *Gates* v. *Tusten*, 89 Mo. 13. *Schindler* v. *Smith*, 18 La. An. 476.

The trustee process, as it is termed in this Commonwealth, or process of foreign attachment or garnishment, as it is called elsewhere, is so far as relates to the trustee an attachment of the property in his hands, and a summons to him to appear at court. And it well may be that an acceptance of service on his part should be regarded as a waiver by him of so much of the process as contains a formal notice to appear, and that, if the defendant does not object and the rights of third parties are not affected, a voluntary appearance and answer on his part should be regarded as sufficient. *Harris* v. *Somerset & Kennebec Railroad*, 47 Maine, 298. *Whitney* v. *Lehmer*, 26 Ind. 503. *Baltimore, Ohio, & Chicago Railroad* v. *Taylor*, 81 Ind. 24. *Carter* v. *Koshland*, 12 Ore. 492. *Roy* v. *Heard*, 38 Miss. 544.

It is not necessary, however, to decide that question now. The only case to which we have been referred, which takes a different view from that which we have taken, is the case of *Cahoon* v. *Morgan*, 38 Vt. 234, which is contrary to the earlier case of *Wilder* v. *Weatherhead*, 32 Vt. 765, in the same State, and, we think, to the weight of authority.

Exceptions overruled.

GEORGE O'CONNOR *vs.* MATTHEW J. WHITTALL.

Worcester. October 5, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Master and Servant — Minor — Dangerous Machine — Assumption of Risk — Action — Absence of Guard.

An intelligent boy nearly sixteen years old, who has never worked in a mill until he is set at work on a machine consisting of an apron upon which wool is placed and which travels over and under a roller having projecting teeth, and who, having been shown how to spread the wool over the apron and told to look out for the roller, is injured, after working several days, by having his hand caught in the teeth of the roller, will be held to have assumed the risk, and cannot maintain an action against his employer for his injury.

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If a boy who is set at work upon a dangerous machine appreciates and understands the risk and works on the machine without objecting to the want of a guard, the fact that the machine might have been safer with a guard is immaterial, in an action by him for injuries received while so working.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by having his hand caught in a machine. The declaration contained three counts, the first two at common law, and the third under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

The machine on which the plaintiff was injured was called a duster or feeder, and was a device connected with a picker, consisting of an apron which carried wool laid upon it up to and under a roller, whence it was carried into the beater of the picker. The apron travelled over and under two horizontal rolls, and was made of strips of wood about one and a half inches wide, presenting about two and a half feet of upper surface as it rolled, and was about two and a half feet long and about one and a half feet wide, and was moved by belting and gearing, which also moved the roller. The apron moved between two cast-iron sides, which served to keep the wool upon it, and was so placed that it ascended as it approached the roller. The roller was about the same length as the width of the apron, made of wood, about six inches in diameter, and with teeth or prongs of iron projecting all over it, about an inch and a half above the surface of the roller. These teeth were designed to pull the wool in, and carry it into the beater of the picker.

The plaintiff, while spreading wool upon the apron, had his left hand caught by the projecting prongs of the roller, and his arm drawn into the beater, and he received the injuries complained of.

The plaintiff testified that he was fifteen years and about eight months old at the time of the accident; that he had never worked in a factory or on any kind of a machine before; that he went to work on the afternoon of July 15, 1895; that one Mort, who was the boss of the carding room, took him to the machine and told him to take the wool from bags and put it on the apron, and keep the apron full and spread it all over; that Mort opened

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the doors under the picker, and told him how to take the dust from under the machine and throw it out of doors every day; that Mort put a little wool on the apron and ran it through; that he filled it half full and ran it through; that then the plaintiff did the same; that there was half a bag full of wool there at the time; that what was in the bag at the time would fill the apron about half full; that when Mort told him how to fill the apron and run it through, he said, "Look out for the roll"; that the plaintiff said, "All right"; that when the wool was run through the beater he was told to take it, put it in bags and drop it out of the window, and then take it to the store room; that Mort was not in the room over fifteen or twenty minutes; that after that Mort took him to the carding room, where there was a large picker, and told him that at five o'clock in the afternoon he was to run what waste there was through and take it up into the dusting room, then in the morning he was to mix it with the wool and run it through the duster; that in the morning he was to collect all the wool waste in the carding room, which would be five or six bags full, take it to the dusting room and run it through the duster; that one Delaney, a boy who had worked on the machine, was with him when Mort was there, and stayed about fifteen or twenty minutes; that Delaney used to run up to see how he was getting along, and stayed five or ten minutes, during the next three days when he worked on the machine; that otherwise he worked alone in the room on the machine; that he worked three days running through the amount of wool that was to be run through, both in the afternoon and in the forenoon; that the machine was stopped by a lever that threw a belt off a pulley; that this lever was on the left hand as he faced toward the machine; that he was told that by kicking a belt off on the opposite side of the machine, and on the right hand as he faced the machine, the duster could be stopped separately from the picker; that the lever would stop the whole machine; that the roller on the duster moved slow; that he went to work on the fourth day, taking the wool waste from the carding room, and putting it through the duster, as he had done on the previous days; that while he was putting the wool through and spreading it over the duster, the accident happened; that the beater of the ma-

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chine was covered with a hood, and revolved with great rapidity; and that the roller of the duster was uncovered.

On cross-examination, the plaintiff testified that he could stand in front of the machine at the end of the apron; that he was told to stand at the corner, and was standing there at the time of the accident; that he was told that if the wool got lumps in it to let it go; that the day before he was hurt he stopped the machine and went to get some wool, and then tried to start the machine, and it would not go, and he called one Dinsdale and Delaney, who fixed it; that Delaney was there when Mort was there, and showed him how to put the wool in the same as Mort did, but Delaney did not run it the first day; that Delaney told him what Mort told him, if it ever got the wool caught to kick the band off; that Delaney did not tell him to put his hand up by the teeth, he told him to keep the apron full of wool and spread it all over all the time; that Delaney came up two or three times and looked on, and went out; that this was the first work he had ever done; that he had been in school up to the time he went to work; that he was studious and stood well in his class; that he got caught by spreading the wool all over; that he reached the bar which stopped the machine, but never thought of kicking the belt off; and that there were no other instructions given to him, and nothing else said about the machine to him.

The defendant called as a witness Alfred Thomas, who testified that he was a partner with the defendant, and that they owned and ran the mill as a partnership, and employed the plaintiff at the time of the accident; that he saw the machine directly after the accident; and that it was in good order.

The defendant also called Mort as a witness, who testified that he told the plaintiff to stand in front of the machine, and if there were any lumps to let them go and take no notice; to take another piece, not to spread it all over, but to lay it on at the lower end of the apron, and that he was never to stand at the side of the machine; that there was nobody there with him at the time but the plaintiff; and that he told him to keep out of danger.

On cross-examination, Mort testified that he had suffered an injury since the accident, and had lost his memory, and finally

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said that he could not swear to anything that he told the plaintiff about the machine, and all he remembered was that he took him to the machine and showed him the same, but that he could not testify as to what he said to him.

George Layng, called as a witness by the defendant, testified that he built machines similar to this, but did not build this machine nor any of the same make; that he saw it three or four days after the accident, and it was then in perfect condition; and that a guard could not be put on there so as to have sufficient material pass through to do the work.

On cross-examination, he testified that a guard might be put four inches above the iron sides, but he thought it would be of no account; that there would be no difficulty in having an iron guard a few inches away from the roll, and even a guard might be put within two inches of the roll; and that, if put high enough to allow the wool to pass under, it would not interfere with the working of the machine.

William Delaney testified, for the defendant, that he had a talk with the plaintiff the day he came; that he went to the machine with him; that there was no one with them at first; that Mort came up afterwards; that he showed the plaintiff where to put the waste, to place it in front of the machine, and take his wool and put it on the apron at the lower end, to hold it on until it got to travelling, and to keep the apron full; that he told him to take the dirt out from under the machine, and to put the sheet in behind the beater for the wool to come out on; that if anything happened, to stop the machine and go down stairs and let him know; that Mort came up and told the plaintiff to do just as Delaney had said and he would be all right; that he could not say that he saw Mort near the machine; that he himself handled the machine for the plaintiff five minutes; then the plaintiff did the same that he did; that he stayed an hour and a half and watched him; and that the plaintiff did it properly. The witness showed the jury where he told the plaintiff to stand, and in doing so placed himself at the corner of the machine with his left hand towards the roller and facing towards the apron, but not facing directly towards the roller, placing himself in substantially the position that the plaintiff testified he was in when the accident happened.

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On cross-examination, he testified that he told the plaintiff if anything happened, to kick the belt off; that sometimes too much wool might get in and it would stop, and then he was to kick the belt off, if he could get to it; that he might not be able to get to that side of the machine; that he told the plaintiff to put the wool on all over, and no higher on one side than on the other; that that was what he showed him; and that he should tell anybody whom he instructed to do it to put it even all over.

The defendant called as a witness one Campbell, who testified that he asked the plaintiff how the accident happened, and he said that he was pushing in wool.

The plaintiff, in rebuttal, testified that he did not tell Campbell that he was pushing in wool; and that Delaney was in the room on the first day not more than fifteen minutes in all.

The judge, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

F. P. Goulding, (*W. C. Mellish* with him,) for the plaintiff.

W. S. B. Hopkins, (*F. B. Smith & W. S. B. Hopkins, Jr.* with him,) for the defendant, was not called upon.

MORTON, J. The plaintiff was injured by having his hand caught in the teeth of the roller, and drawn in and crushed. He was a little less than sixteen years of age, and had never worked in a mill till he was set to work on the machine by which he was injured, a few days before the accident occurred. He seems to have been a bright boy, and when he went to work he was shown how to spread the wool over the apron, and was told to look out for the roller, and said in reply, "All right." It must have been apparent even to a boy of his limited experience that it would be dangerous to get his hand caught in the teeth of the roller, and that that was liable to happen if his hand got too near it. There was no hidden danger, and that portion of the machine on which the plaintiff was working was simple in construction and operation, and there was nothing, we think, which, making due allowance for his youth and inexperience, he could not or did not appreciate and understand. We think, therefore, that he must be held to have assumed the risk. *Ciriack* v. *Merchants' Woolen Co.* 146 Mass. 182. *Crowley* v. *Pacific Mills*, 148 Mass.

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228. *Coullard* v. *Tecumseh Mills*, 151 Mass. 85. *Ciriack* v. *Merchants' Woolen Co.* 151 Mass. 152. *Pratt* v. *Prouty*, 153 Mass. 333. *Patnode* v. *Warren Cotton Mills*, 157 Mass. 283.

If the plaintiff appreciated and understood the risk, and worked on the machine without objecting to the want of a guard, the fact that the machine might have been made safer with a guard is immaterial. *Sullivan* v. *India Manuf. Co.* 113 Mass. 396. *Gilbert* v. *Guild*, 144 Mass. 601. *Ciriack* v. *Merchants' Woolen Co.* 146 Mass. 182. *Downey* v. *Sawyer*, 157 Mass. 418.

Exceptions overruled.

DANIEL DEAN *vs.* E. D. SMITH & others.

Worcester. October 5, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Master and Servant — Employers' Liability Act — Negligence of Superintendent — Assumption of Risk — Law and Fact.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by an explosion of dynamite in a rock where he was drilling, there was evidence tending to show that A. was acting as superintendent in directing the work and telling where holes were to be made; that, two days previously, a hole which had been loaded with dynamite had not been fired, owing to a want of connection of the wire; that this was known to A., who directed the plaintiff to drill a new hole which pointed towards the hole where the dynamite was; and that the explosion resulted from contact with the dynamite in drilling the new hole. The plaintiff testified that he knew nothing of dynamite being in the rock; and there was evidence for the defence that A. had reason to think that this charge had been exploded, and that, before putting the plaintiff to work, he looked to see if he could find any miss-fires, and found none. *Held*, that the plaintiff could not be said, as matter of law, to have assumed the risk, and was entitled to go to the jury upon the question of A.'s negligence.

TORT, for personal injuries received by the plaintiff, while in the defendants' employ. The declaration contained three counts, the first and third at common law, alleging negligence of the defendants, and the second under the employers' liability act, St. 1887, c. 270, alleging negligence of a person in the defendants' service, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence.

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Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

The defendants were contractors engaged in building an underground conduit in the construction of the Metropolitan Waterworks at Berlin. The shaft at "shaft No. 2" had reached the level of the conduit, which consisted at that point of a tunnel running each way from the shaft. It was in this tunnel that the plaintiff was injured by an explosion of dynamite on August 10, 1896, which was Monday.

The plaintiff testified that he was taken into the employ of the defendants in April, 1896, by one McAttee, who hired him for drilling; that he worked there up to the time of the accident; that on the day of the accident he was drilling on the bench, which is that part of the shaft below the heading; that McAttee did not do anything but give orders; and that McAttee was there on the day when he was hurt and put him to work; and further testified as follows: "When he came up I was standing on the bench with a lamp in my hand, and he told me, 'Get your drill and put a hole in down here.' That was down on the side of the bench. It was a rock at the foot of the bench like a step at the left side of the conduit or tunnel. He told me to put in a lifting hole to blast this rock or step away. That is a hole to run slanting with the ground or bottom of the tunnel. He kicked the rock and told me where to put my machine, . . . and said let her go there right into the rock. . . . After he told me which way he wanted the hole to go, he went off somewhere, having told me to put the hole in four feet. I kept drilling about fifteen or twenty minutes before it blew up. . . . I knew nothing about there being any dynamite in the rock. . . . I had no orders to work there except from McAttee."

Daniel M. Hawkins, called as a witness by the plaintiff, testified that he was engaged on the same work for the defendants and was in the tunnel the same night in which the plaintiff was hurt; that he was helping him on the drill; that he did not see McAttee at the time, but knew that he was there seeing to the drilling; that "he told us where to drill"; that they drilled fifteen or twenty minutes before the explosion; and that McAttee directed the plaintiff and himself all the time he was drilling

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before the explosion occurred, and the last he saw of him was five minutes prior to the explosion.

Thomas Scott, called as a witness by the plaintiff, testified that he was working with the plaintiff the night he was injured; that he saw McAttee around there; that he "was boss"; and that he came in and told the plaintiff where he wanted him to drill.

Luke Moore, called as a witness by the plaintiff, testified as follows: "I worked in shaft No. 2 the Saturday before the accident at the east end all day. Five holes were drilled across the bench and loaded. When they were filled with dynamite the next thing was to put an exploder into them. . . . Then we connected the wires. I put wires into each of these five holes. . . . The second hole from the left hand rib the wires were not connected with. The wire in that hole was broken off so we could not connect it. The tamping was all on the powder when I saw that the wire in that hole was broken off. . . . McAttee went to all those holes before they were exploded. I told him those wires were pulled off so we could not connect that hole. He said, 'Leave it and go to the others.' We connected the first with the third, skipping the second. After that the main wires were put on and fired the holes."

Robert Wells, called as a witness by the plaintiff, testified as follows: "I worked in shaft No. 2 on Saturday before the plaintiff was hurt. . . . McAttee called me to help Moore tamp the hole. When we got to the second hole, the wire was broken. Moore told me to go and tell the foreman that a wire was broken in the hole, and we could not connect. I went and told McAttee, and he came and looked at it. Said, 'Let her go.'"

Carey Dean testified, for the plaintiff, as follows: "I worked in the west heading in the forenoon, and partly in the afternoon, Saturday before the accident. I went to the east heading about a quarter of five Saturday afternoon. I walked in after McAttee. When I got there he was standing up on top of the bench, six or seven feet up, and when I was standing up with an arm full of powder I saw the wire hanging out the second hole from the rib. Three holes had been exploded. . . . The second one had not stirred at all, only the wires were hanging down off the bench. I said, 'McAttee, this hole did not go off.' He said,

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'No, the wire was cut in that hole' I said, 'Was the powder exploded in it?' He said, 'No, leave it,' and he stood with a stick and shoved the powder in the first hole. Then I connected the first hole and skipped the second; then we all went up on top and exploded the blast. McAttee told me not to interfere with that hole, and I asked him particularly, as I thought he did not see it, as he was standing on top, and I said, 'Here is a miss-hole,' and he said he knew it. I says, 'I will put an exploder in,' and he says, 'No, leave it go.' . . . I was cleaning the west heading when I heard the explosion. I then went to the east heading and ran to the face of the bench. . . . The drill was pointed diagonally. I do not suppose the foot of it was any farther from the rib than two feet or three feet, and then it would run right into a hole that was left there. . . . This hole was fired twice Saturday."

McAttee, called as a witness for the defendants, testified: "I was foreman in shaft No. 2. . . . I have known holes not connected by the powder to be fired. When a hole is not connected with the powder, it is left to the judgment of the foreman. I left that hole off and connected the other four and fired them. I went back and saw that the holes did not do the execution they ought to have done. I reloaded every one of those holes, and put the powder down and fired them. The miss-hole was the one where the wire broke, and I left it. I did not put the powder in that hole. After firing the second time I went home Saturday night. . . . I went in there again Monday evening. . . . I saw right away there was some bottom about a foot and a half all the way across the tunnel, so I had that cleaned up, and looked around to see if there were any holes that had missed. I could not find any anywhere, so I put the plaintiff and Hawkins on the left hand side of the tunnel with their machines, and Scott and Williams on the right to drill lifting holes. . . . The first thing I did when I went to work on Monday night was to look after the miss-fired holes."

William E. Gibbs, called as a witness by the defendants, testified that he had made a special study of and had had special experience in the use of dynamite in rock; and after the circumstances prior to the accident had been referred to, he was asked the following question: "I suppose if the drill reached

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the dynamite in the rock it would explode?" to which he answered, "Always, if it struck it."

Robert Hosley testified for the plaintiff, in rebuttal, that he worked in shaft No. 2 on the Saturday night prior to the accident; that one Wilson was foreman that night; that they did not do any work on the bench until they had drilled the east heading above the bench; that they drilled the heading and fired it on Sunday morning; that he worked in that heading again on Monday morning; that Wilson was foreman, and was there; that when Wilson came in he walked up to the bench, and the witness told him he had missed a hole there and asked him what he was going to do about it, whether he was going to fire it or not, and he said, "No, leave it alone and stay up in the heading"; and that they did not blast on that bench Monday.

The evidence in the case showed McAttee to be a superintendent, under the statute.

At the conclusion of the evidence, the defendants asked the judge to rule that, upon all the evidence in the case, the plaintiff was not entitled to recover; but the judge declined so to rule.

The jury returned a verdict for the plaintiff under the second count; and the defendants alleged exceptions.

W. S. B. Hopkins, (*F. B. Smith* with him,) for the defendants.

H. Parker, (*C. C. Milton* with him,) for the plaintiff.

ALLEN, J. There was evidence tending to show that McAttee was acting as superintendent in directing the work, and telling where holes were to be made; that on the Saturday before the accident one hole, which had been loaded with dynamite, had not been fired, owing to a want of connection of the wire; that this was known to McAttee; that on the Monday following he directed the plaintiff to drill a new hole, which pointed towards the hole where the dynamite was; and that the explosion by which the plaintiff was hurt resulted from contact with the dynamite in drilling the new hole. This evidence tended to show that the accident occurred in consequence of the negligence of the defendants' superintendent, while he was acting in that capacity. The plaintiff testified that he knew nothing of there being dynamite in the rock; and it could not be held as matter of law that he assumed the risk.

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There was some evidence on the part of the defence that McAttee had reason to think that this charge had been exploded, and that before putting the plaintiff to work he looked to see if he could find any miss-fires, and found none. But on all the evidence, it was for the jury to determine whether he was negligent in putting the plaintiff to work there, knowing that one charge had not been exploded, or making an insufficient and negligent examination to ascertain the facts. *Exceptions overruled.*

PATRICK DONAHUE *vs.* WASHBURN AND MOEN MANUFACTURING COMPANY.

Worcester. October 8, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Personal Injuries — Assumption of Risk — Employers' Liability Act — "Ways, Works, or Machinery."

At the trial of an action for personal injuries occasioned to an employee, it appeared that his glove got caught on a coach or set screw, when he reached in his hand in a manner not clearly explained, to cut the wire in order to take the reel of wire from the block, and that he had worked for six weeks on the machine, and for two years previously on another machine which differed only in making fewer revolutions a minute and in having a larger diameter. There was nothing to show that the plaintiff was not of full age and average understanding. *Held*, that the risk was an obvious one, and that he assumed it.

It seems, that a set screw which is not out of order, which is a common device for the purpose for which it is used, and which was put on in the usual manner, does not of itself constitute a defect in the "ways, works, or machinery," within the meaning of the employers' liability act, St. 1887, c. 270.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration contained two counts, the first at common law and the second under the employers liability act, St. 1887, c. 270. Trial in the Superior Court before *Dewey*, J., who directed the jury to return a verdict for the defendant, and, at the request of the plaintiff, reported the case for the determination of this court. The facts appear in the opinion.

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B. W. Potter, for the plaintiff.

F. B. Smith, for the defendant.

MORTON, J. It is not easy to understand from the exceptions the precise manner in which the accident occurred. The plaintiff testified that his glove got caught on the coach or set screw when he reached his hand in to cut the wire for the purpose of taking the reel of wire from the block. How he reached his hand in is not clear. But he had worked for six weeks on the machine on which he was injured, and for two years before that on a similar machine, which only differed from the one in question in making eighteen or twenty revolutions instead of thirty or thirty-two a minute, and in being twenty-two inches in diameter instead of sixteen. There was a coach or set screw on that like the one which caught the plaintiff's glove on the machine on which he was hurt. The work done on both machines was the same, that of reeling wire, and the operation of them was the same, and the only difference between the two was, as already stated, that the one on which the plaintiff was injured revolved a little faster and was a little smaller than the other. There is nothing to show that the plaintiff was not of full age and of average understanding. And we think that, taking his experience into account, the risk must be held to have been an obvious one, and that he assumed it. *Goodnow* v. *Walpole Emery Mills*, 146 Mass. 261, 267. *Hale* v. *Cheney*, 159 Mass. 268. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153. *Connelly* v. *Hamilton Woolen Co.* 163 Mass. 156. There was nothing out of order about the set screw. It was a common device for the purpose for which it was used, and was put on in the usual manner, and did not of itself constitute a defect in the ways, works, or machinery. *Goodnow* v. *Walpole Emery Mills*, and *Rooney* v. *Sewall & Day Cordage Co.*, *ubi supra.*

We do not mean to say that a set screw might not be so used as to constitute a defect. The defendant has not argued that there was any negligence on the part of the foreman, and we think that the evidence does not show any. In the opinion of a majority of the court, there should be judgment on the verdict.

So ordered.

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ALVIN H. WHITING *vs.* EDWARD R. PRICE & another.

Bristol. October 25, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Sale of a Bond — False Representations — Pleading.

In an action for false representations, the declaration alleged that the defendants sold to the plaintiff a certain bond purporting to be a first mortgage bond of the J. Company, and to induce the plaintiff to buy "falsely represented to him that said bond was good, of full value, a good investment, and secured by the machinery and real estate of the J. Company and of other companies of the value of half a million dollars," and that, believing the representations to be true, the plaintiff purchased the bond, "and said bond was not good, of full value, a good investment, nor was it secured by the machinery and real estate of the value of half a million dollars of the J. Company, or of any other companies, all of which said defendant then knew; . . . said bond was and is of little or no value." The plaintiff did not contend that the representations were intentionally fraudulent, and, on the ground that they were mere matters of opinion, the judge directed a verdict for the defendant. *Held*, that the allegations were actionable.

TORT, for false representations. The declaration alleged that the defendants sold to the plaintiff "a bond purporting to be a first mortgage bond, duly issued by the Jacksonville Electric Light Company, County of Duval, State of Florida, said bond being for the sum of one thousand dollars and interest, and being numbered ten; and to induce said plaintiff to buy, the said defendants falsely represented to him that said bond was good, of full value, a good investment, and secured by the machinery and real estate of the Jacksonville Electric Light Company, and of other companies, of the value of half a million dollars. And said plaintiff, believing that said representations were true, was thereby induced to purchase, and did purchase said bond, and paid therefor to the defendants the sum of one thousand and two dollars and seventy-two cents. And said bond was not good, of full value, a good investment, nor was it secured by the machinery and real estate of the value of half a million dollars of the Jacksonville Electric Light Company, or of any other companies, all of which said defendants then knew, said facts being within their means of knowledge; that said bond was and is of little or no value."

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At the trial in the Superior Court, before *Bishop*, J., the plaintiff did not contend that the representations were intentionally fraudulent, and the defendants asked the judge to rule that the declaration would not support a verdict for the plaintiff, on the ground that the representations set out were matters of opinion. The judge so ruled, and directed a verdict for the defendants. The plaintiff alleged exceptions.

G. A. Perkins, for the plaintiff.

W. H. Pond, for the defendants.

HOLMES, J. The representation that the bond was secured by the machinery and real estate of the Jacksonville Electric Light Company and of other companies of the value of half a million dollars, if fraudulent, went beyond the latitude allowed to sellers by the latest decisions of this court. *Kilgore* v. *Bruce*, 166 Mass. 136. *Andrews* v. *Jackson*, 168 Mass. 266. Naming the company and going into particulars as it did, the statement could not be excused as one of those generalities which, whether true or not, are to be expected from a man who wants to sell his goods. *Homer* v. *Perkins*, 124 Mass. 431, 433. *Roberts* v. *French*, 153 Mass. 60, 63. *Way* v. *Ryther*, 165 Mass. 226, 229. It is alleged that the representation was false, and that the defendants knew it to be false. If so, it was fraudulent, even if not made for purposes of gain, and being made at a time when it was plain that it tended to induce the plaintiff to make a bargain different from the one which he thought he was making, if, as alleged, it had that effect, it was actionable. See *Stone* v. *Denny*, 4 Met. 151, 161; *Fisher* v. *Mellen*, 103 Mass. 503; *Litchfield* v. *Hutchinson*, 117 Mass. 195; *O'Donnell* v. *Clinton*, 145 Mass. 461, 462, and cases cited; *Holst* v. *Stewart*, 154 Mass. 445, 446; *Railton* v. *Mathews*, 10 Cl. & F. 934, 941, 944.

According to the bill of exceptions the ruling of the court was upon the declaration, and, this being so, the statement that the plaintiff did not contend that the representations were intentionally fraudulent cannot be taken to mean more than that he disclaimed a corrupt intent, which, as we have said, is not necessary to the cause of action, however improbable it may be that such representations, if known to be false, should be made with any intent except to bring about the sale. It was said at the argument that the case had been opened to the jury before the

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ruling. Probably the disclaimer had reference to the evide rather than to the pleading, and the judge may have been th ing of the opening rather than of the declaration when i ruled.

There is a negative pregnant in the declaration which wo have to be considered seriously if we were not satisfied t nothing turned on it in this case. We mention it because it b become an every-day fault in Massachusetts pleading to g the negative the same particularity as the averment. Here negative is that the bond was not secured by the machinery a real estate of the value of half a million dollars of the Jack Electric Light Company, or of any other companies. This consistent with the security's having existed to the value four hundred thousand nine hundred and ninety-nine dol Gould, Pl. (4th ed.) c. vi. §§ 30, 32. But we assume that declaration was intended and taken to deny the existence any security of the kind alleged. It is unnecessary to cons whether insufficiency in the declaration justifies directing verdict. *Exceptions sustained.*

JANE GALLAGHER *vs.* HATHAWAY MANUFACTURING CORPORATION.

Bristol. October 25, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Case Stated — Inferences of Fact.

If a case is submitted to the Superior Court, or to this court, on agreed facts ferences of fact cannot be drawn by the court.

CONTRACT to recover a balance due for wages. The case w submitted to the Superior Court, and, after judgment for the de fendant, to this court on appeal, upon agreed facts, in substan as follows.

The defendant, a cotton manufacturing corporation, made written offer that it would pay for weaving a cut of cloth d

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style designated as No. 294 as follows: for a cut of first quality, $1.17; for a cut of second quality, 58½ cents. Whether a cut of cloth woven was to be classed as first or second quality was to be determined by the defendant's superintendent. The plaintiff went to work before reading this written offer, and without any further communication with the agents of the defendant wove a cut of cloth of style No. 294. It was inspected by the defendant's superintendent, and by him classed as second quality cloth, on account of a number of imperfections in the weaving due to the plaintiff's own carelessness. She was paid for that cloth, but the next week a deduction on account of the defective cut was made from her wages. She refused to agree to the deduction, and left the defendant's employ. The deduction was what is commonly known as a "fine"; and the plaintiff contended that the question was whether the defendant in making the fine complied with the provisions of St. 1894, c. 508, § 55.

J. W. Cummings, (*C. R. Cummings* with him,) for the plaintiff.

O. Prescott, Jr., for the defendant.

HOLMES, J. We have made an effort to settle the questions at issue between the parties on this agreed statement, but we have found it impossible. Neither we nor the Superior Court can draw inferences of fact from an agreed statement. *Old Colony Railroad* v. *Wilder*, 137 Mass. 536, 538. Yet the most important issues between the parties are left dependent upon conclusions of fact which are not drawn in the statement. The first of these is whether the plaintiff contracted on the terms of the notice. She had read it, but on the other hand she had gone to work before she had read it, so that there is a question left open, — not, to be sure, whether she inwardly assented to the notice, but whether the reasonable import of her overt acts was assent to its terms. It is true that she shows no other claim to be paid at the rate of one dollar and seventeen cents. But her action technically is to recover money due to her for other work. The work in question had been paid for, and she might recover without proving anything more than that she had done the later work and the rate at which she was to be paid. The defendant has to make out a right to deduct something from a sum admitted to have been earned.

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Assuming with the plaintiff that the notice is a notice o fines, there might be a second question whether the plaintiff u derstood or ought to have understood that that was what was meant by the lower price for second quality work. If this were the only question, we should assume that the meaning of the notice was sufficiently plain to be understood by hands of common experience.

But there is a further difficulty from which we cannot escap Whether the plaintiff understood and by implication agreed th the payment of first quality prices was provisional, and that if there was an overpayment the amount might be withheld the next week, is a pure question of fact, which must be settled before we can reach the questions of law which we suppose the parties really wish to have decided. We think that justice would not be done if we should give judgment while the matters which we have mentioned remain open, and therefore must discharge the statement. *Old Colony Railroad* v. *Wilder*, 137 Mass. 536, 53

Case stated discharged.

NEW YORK LIFE INSURANCE COMPANY *vs.* WILLIAM H. M MACOMBER & others.

Bristol. October 26, 1897. — November 24, 1897.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & BARKER, JJ.

Collateral Statement of Judge no Part of Record — Auditor's Report — Exceptions — Appeal.

In an action on a bond the statement of the ruling by a judge of the Superior Co that "the question as to the liability of the sureties on the bond, by reason the special matter set up in their answers, is not open to the sureties after verdict," although certified by the clerk as by the court, stands no differe from a memorandum to like effect under the hand of the judge, and is no p of the record; and the remedy of the sureties is by bill of exceptions, and n by appeal.

It seems that, after verdict and judgment upon a bond, at a hearing to fix the am of the execution, the question of the release of the sureties by the obligee's c cealment of facts is not open.

It seems that, in an action against the sureties on a bond given to secure prese as well as future indebtedness, and executed without inquiry, the fact that the obligee had means of knowing that the principal was indebted is immateria

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CONTRACT, against William H. M. Macomber as principal, and John C. Shaw and William F. Nye as sureties, on a bond. In the Superior Court judgment was entered for the plaintiff in the penal sum of the bond, with interest from the date of the writ; and the sureties appealed to this court. The facts appear in the opinion.

F. A. Milliken & A. E. Perry, for the sureties.

J. L. Gillingham, for the plaintiff.

HOLMES, J. This is an action upon a bond given to secure the discharge of his duties by an agent of the plaintiff, and is here by appeal of the sureties. The case was tried before a jury upon answers denying everything, and alleging, among other things, that the plaintiff was guilty of laches in not informing these defendants of any claim it had against the principal obligor. The jury found a verdict for the plaintiff for the penal sum of the bond, and the case was sent to an auditor, to ascertain, we assume, the amount for which execution should issue. His report was filed, and thereafter the sureties amended their answers and set up fraudulent concealment of its knowledge on the part of the plaintiff. The papers before us set forth the report and a supplemental report, and then a document headed "Finding," and beginning, "In the above entitled action judgment is to be entered for the plaintiff," etc., stating the amount and that execution is to issue for it, and then going on, "And the court ruled that the question as to the liability of the sureties on the bond, by reason of the special matter set up in their answers, is not open to the sureties after the verdict." This is what is relied on to raise the question of law which has been argued. But this document, although certified by the clerk as by the court, stands no differently from a memorandum to like effect under the hand of the judge. The collateral statement of the ruling by the court is no part of the record, and cannot be considered upon an appeal. Pub. Sts. c. 152, § 10. If the defendants had wished to object to the ruling they should have excepted. *Standish* v. *Old Colony Railroad*, 129 Mass. 158.

In deciding the case upon a technical ground, as we must, we do not wish to be understood to suggest any doubt as to the correctness of the ruling, (see *State* v. *Brinyea*, 5 Ala. 241, 243,

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and *Leonard* v. *Whitney*, 109 Mass. 265, 267, 268,) or to intima- that the auditor's report discloses facts to support the defend- ants' contention. Without inquiry or interview with the plain- tiff, the defendants executed a bond which was conditioned i terms on the payment of existing as well as future indebtedne and forwarded it to the plaintiff. The plaintiff at the time did not know that the principal was in default, as in *Franklin Ba* v. *Cooper*, 36 Maine, 179, (see *Tapley* v. *Martin*, 116 Mass. 2 and is not found even to have known that he was indebt It "knew or had means of knowing." The case is not wit the judgment of the majority in *Lee* v. *Jones*, 17 C. B. (N. S. 482, even if the plaintiff's knowledge would have been mater which is open to question, as the bond expressly contemplat a present debt. *Wilmington, Columbia, & Augusta Railroad* v. *Ling*, 18 S. C. 116, 122. See *Watertown Ins. Co.* v. *Simmo* 131 Mass. 85. *Appeal dismissed.*

ANDREW J. IVERSON *vs.* GEORGE SWAN.

Essex. November 3, 1897. — November 24, 1897.

Present: HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Trespass upon Land — Boundary — Deed — Estoppel.

If the boundary line between the land of two persons holding title under deeds from a common grantor is described as at right angles with a certain street, and if the line is drawn at right angles the boundary of one will be fifty-three and a half feet instead of "about fifty feet" as in the deed, there is no such conflict between the angle and the measurement in the deed as creates an uncertainty to be construed by the acts of the parties, but the angle is the true line.

The building, by the predecessor of one of two adjoining owners of land holding title under deeds from a common grantor, of a fence which diverges somewhat from the boundary line described in the deeds, and which stands for nineteen years before an alleged trespass by his successor, does not create an estoppel which will bind the latter, nor does the building of several feet of sea wall beyond his boundary line by the other owner, acting under the same mistake as the person first named, raise an estoppel.

TORT, for breaking and entering the plaintiff's close in Beverly, and tearing down and carrying away a fence and erecting

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a building thereon. Trial in the Superior Court, before *Hammond*, J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

R. W. Boyden, for the plaintiff.

A. L. Huntington & A. Fitz, for the defendant.

HOLMES, J. The only question was with regard to the true boundary line between the plaintiff and the defendant. Both parties held under deeds from a common grantor, in which the boundary line was described as at right angles with Lothrop Street. If this was the line, the defendant was entitled to a verdict, and the judge was right in directing one in his favor. To control this the plaintiff put in evidence that the defendant's predecessor in title, who held under the earlier deed, set up a fence which diverged somewhat from the right angle and made the line insisted on by the plaintiff; that the fence had stood for at least nineteen years before the trespass complained of; and that the plaintiff bought his land and made some slight improvements on the piece in controversy, supposing that the fence stood on the boundary line. He also proved that, if the line were drawn at right angles, the defendant's southeasterly boundary would be fifty-three and a half feet instead of "about fifty feet" as in the deed. His argument is that the angle does not prevail over the measurement, that the acts of the parties interpreted the deed, and that the building of the fence was an estoppel, as against a later purchaser of adjoining land who had improved the land up to the fence.

The argument cannot prevail. There is no conflict such as is imagined between the angle and the measurement, since the measurement does not purport to be exact, but on its face is only a rough estimate, prefaced by the word "about." *Hall* v. *Eaton*, 139 Mass. 217, 222. There is no uncertainty to be construed by the acts of the parties. The building of the fence was not in pursuance of an agreement to settle a doubt, even in the parties' minds. It was merely an act of one of them, proceeding under a mistake, and did not bind him. *Hall* v. *Eaton*, 139 Mass. 217, 223. The lapse of time short of the period of prescription does not help the plaintiff, and the fact that, acting under the same mistake as the defendant's predecessor, he has

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built three feet of sea wall beyond his boundary line, does not raise an estoppel. Both parties had equal means of knowledge of the true line, each had a right to assume that the other would know that he stood upon his rights, and, under our decisions, in pursuance of that assumption might erect an ordinary fence without renouncing title or warranting the other in supposing that he renounced title beyond it, if he should turn out to have a title by the deeds. *Tolman* v. *Sparhawk*, 5 Met. 469, 477. *Brewer* v. *Boston & Worcester Railroad*, 5 Met. 478. *Proprietors of Liverpool Wharf* v. *Prescott*, 7 Allen, 494. *Proctor* v. *Putnam Machine Co.* 137 Mass. 159. *Exceptions overruled.*

GEORGE H. PLUMMER *vs.* JOHN A. GREENWOOD.

Essex. November 3, 1897. — November 24, 1897.

Present: HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Conversion — Res Gestæ — Instructions — Delivery — Payment.

At the trial of an action for the conversion of a carryall, it appeared that the defendant, who held the carryall under a bill of sale as security for a debt, left it with A., who had repaired it; that the defendant agreed with B., from whom he received it, to give up his claim upon it on payment of A.'s bill for repairs, the agreement being made in consideration of a part payment of his debt; that he then gave B. an order to A., which read, "Deliver to bearer my carryall upon payment of charges thereon"; and that B. then went with the plaintiff, carrying the order, to A.'s shop, where a conversation occurred among the three, which was introduced by the plaintiff against the defendant's objection as evidence of a novation which amounted in law to a payment of the bill for repairs, and also as evidence of a delivery of the carryall to the plaintiff. A. testified "that he knew the plaintiff, that he was good for any amount, and that he agreed to accept him as paymaster of the bill for all charges on the carryall." *Held*, that the conversation was competent as part of the *res gestæ*, and that the objections to the instructions of the judge, which allowed the jury to find that the conditions stated in the order upon which delivery might be made were performed, could not avail.

TORT, for the conversion of a carryall. At the trial in the Superior Court, before *Hammond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

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J. H. Sisk, for the defendant.

W. H. Niles & G. J. Carr, for the plaintiff.

KNOWLTON, J. The defendant held a carryall under a bill of sale as security for a debt, and he left it in the possession of Sawyer and Chase, who had made repairs upon it. He agreed with Story, from whom he received it, to give up his claim upon it on payment of the bill of Sawyer and Chase for repairs, which amounted to thirty dollars. This agreement was made in consideration of a part payment of his debt, and he then gave Story an order to Sawyer and Chase, in substance as follows: "Sawyer and Chase, Deliver to bearer my carryall upon payment of charges thereon. John A. Greenwood." Story then arranged to sell it to the plaintiff, and went with him, carrying the order, to the shop of Sawyer and Chase, where he and Sawyer and the plaintiff had a conversation, which was introduced by the plaintiff as evidence of a novation that amounted in law to a payment of the bill for repairs, and also as evidence of a delivery of the carryall to the plaintiff. The only exceptions in the case are to the admission of this conversation in evidence, and to the instructions of the judge, which allowed the jury to find that the conditions stated in the order upon which delivery might be made were performed.*

As it was important for the plaintiff to prove a payment for the repairs and the delivery of the property, the words in which the transaction were clothed were clearly competent as a part of the *res gestæ*. *Place* v. *Gould*, 123 Mass. 347. It is not necessary, as contended by the defendant, that the payment should be in money. Sawyer testified "that he knew the plaintiff, that he was good for any amount, and that he agreed to accept him as paymaster of the bill for all charges on the carryall." The conversation objected to tended also to show that he accepted the plaintiff's promise as a payment, and that the debt of the defendant for the repairs was thereby discharged.

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* The instructions were: "The order said that Sawyer and Chase were to be paid, but that is a matter for them (Sawyer and Chase) to consider. If they agreed to look to Plummer for the money, they had the right to waive the payment of it. For their benefit that was inserted in the order, and, at any rate, if they afterwards considered that Plummer or somebody besides Greenwood would pay it, why that is sufficient."

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The instruction of the presiding justice upon this part of the case was correct. It was immaterial to the defendant in what form the payment was made. Anything that Sawyer and Chase chose to accept as a payment would discharge him from further liability, and establish a payment within the meaning of the order. *Exceptions overruled.*

ISAAC CALL *vs.* JAMES E. HAYES.

Essex. November 3, 1897. — November 24, 1897.

Present: HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Malicious Prosecution — Evidence — Want of Probable Cause — Libel — Law and Fact.

A., who was in B.'s employ, was discharged on Sunday, and told that B. would hold him responsible for every cent that there was on his books, and that he would settle with him on Tuesday afternoon. A. communicated to B. on Monday, through C., the information that he would make a settlement with him on that evening, and during the day collected some money which was due from B.'s customers. On Tuesday morning B. instituted a complaint against A. charging him with embezzlement of the money. *Held*, in an action by A. against B. for malicious prosecution, in which C. testified that he delivered A.'s communication to B. on Monday, that A. was properly allowed to testify that he instructed C. to make such communication.

A. was discharged from B.'s employ on Sunday, B. informing him that he should hold him responsible for every cent that there was on his books, and that he would settle with him on Tuesday afternoon. A. sent word to B. on Monday that he would settle with him on that evening. B. declined this offer, and caused A. to be arrested on Tuesday morning upon the charge of embezzlement, which was founded on A.'s having collected on Monday some money due from B.'s customers; and B. testified, in the hearing on the complaint, that he held A. responsible for all the accounts on his books. *Held*, in an action by A. against B. for malicious prosecution, in which B. admitted that he instituted the prosecution for the purpose of getting back his money of his customers, that there was sufficient evidence of want of probable cause in the prosecution.

An article published in a newspaper, and signed by B., the proprietor of a laundry, stated that "A. has been in our employ as driver. He left Sunday without notice. Early Monday morning he went over our route, collected and work as usual, and turned it over to C.," a competitor. "He also collected money on our account. We had confidence in this man, as he was well recommended. We hope and expect that most of our customers will return, as we do not believe they would be a party to any such 'scoop' if they knew the circumstances. We understand that negotiations for this deal have been in progress

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for some time. The public can form their own opinion of a man who will do this, or a firm who will employ him to do it. Pay no money to A. on our account." *Held*, in an action by A. against B. for libel, that the question whether the article was defamatory was rightly submitted to the jury.

TORT, in two counts. The first count alleged that the defendant, on August 13, 1895, falsely and maliciously, and without any reasonable cause, procured the plaintiff to be complained against for the alleged embezzlement of one dollar and sixty cents, the property of the defendant; and that the defendant, without any probable cause, prosecuted the complaint against the plaintiff, who on August 14 was acquitted of the charge in such complaint.

The second count alleged that the defendant caused to be published in a newspaper called the Daily Evening Item, published in Lynn, a false and malicious libel concerning the plaintiff, a copy of which was as follows:

"Notice. Isaac Call has been in our employ as driver. He left Sunday, August 11, without notice. Early Monday morning he went over our route, collected our work as usual, and turned it over to the Excelsior Laundry, Albany Street, Kelley and Batchelder. He also collected money on our account. We had confidence in this man, as he was well recommended. We hope and expect that most of our customers will return, as we do not believe they would be a party to any such 'scoop' if they knew the circumstances. We understand that negotiations for this deal have been in progress for some time. The public can form their own opinion of a man who will do this, or a firm who will employ him to do it. Pay no money to Isaac Call on our account. Respectfully, The City Laundry, J. E. Hayes, Proprietor."

Trial in the Superior Court, before *Braley*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that he was twenty-six years of age, a married man, living with his wife and child in Lynn; that he had been at work for the defendant for about a year prior to August 11, 1895; that his business was that of driving a team and collecting laundry work, and delivering the same and collecting money for the same; that about two weeks prior to August 11, he took a man by the name of Bowley on his team

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with him for the purpose of teaching him the route; that it was his intention to take a vacation of two weeks; that he saw the defendant on August 11, and told him that he came to get his bills, so as to fix them for Bowley the next day, and that he would go with Bowley on Monday, the following day, to help him; that the defendant said, "I guess I won't need you any longer"; that he asked the reason, and the defendant said, "You haven't been as good a man as I wish I had on the route"; that he replied, "All right, Mr. Hayes, then I shall consider myself discharged, will I not?" and the defendant replied, "Yes"; that he said, "All right, I would like to have a settlement"; that the defendant replied that he did not make any settlements on Sundays, that Tuesday afternoon was the regular time that he had to make a settlement, and was the time when he would settle with him, and the plaintiff said, "Very well"; and that the defendant said, "I shall hold you responsible for every cent that there is on my books."

The plaintiff further testified, against the objection and under the exception of the defendant, as follows:

"*Q.* I want to know if on Monday you sent any communication to the defendant? *A.* I did, sir, Monday noon.

"*Q.* By whom did you send it? *A.* By Albert Bowley.

"*Q.* What was that communication? *A.* I asked Mr. Bowley to ask Mr. Hayes if I could make a settlement with him Monday evening, either at his house or office, whichever was most satisfactory to him. I told Mr. Bowley to tell him the reason was that I was working for Kelley and Batchelder, and did not want to infringe on their time."

Bowley testified, without objection, that he communicated this language to the defendant on Monday afternoon; that the defendant replied that he would not settle with the plaintiff until Tuesday noon; and that the witness so told the plaintiff, as a reply from the defendant.

The plaintiff further testified that he made arrangements with Kelley and Batchelder on the same Sunday, namely, August 11, to go to work for them in the same line of business that he had been engaged in before for the defendant; that he was arrested upon the complaint referred to in the first count of the declaration, on Tuesday morning, August 13; and that he was discharged upon the complaint on the next day.

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The plaintiff introduced in evidence the complaint, and also the record of the Police Court of Lynn, showing that upon a hearing the plaintiff was discharged; and that the proceedings in that court were terminated before the present action was begun.

The plaintiff testified, on cross-examination, that, about two weeks prior to August 11, he spoke to the defendant about going on a vacation, and the defendant told him that he did not want him to go; that, on Monday morning, while he was at work for Kelley and Batchelder, he collected money belonging to the defendant, substantially the amount charged in the complaint referred to in the declaration; and that he did not turn over this money until after he was arrested, but at the time of collecting it he informed the persons who paid it that he was not in the employ of the defendant.

The plaintiff further testified that on Monday morning, when he went to work for Kelley and Batchelder, he went over some part of the route which he had formerly covered when at work for the defendant, and got as many of the customers' laundry as he could get, and brought the work to the shop of Kelley and Batchelder, but that he informed every customer of his discharge, and solicited the work for Kelley and Batchelder.

John M. Kelley, a witness for the plaintiff, testified that on Sunday, August 11, he saw the plaintiff, and made arrangements with him to go to work for his firm, namely, Kelley and Batchelder; and that prior to that day there had been no negotiations whatever between the plaintiff and his firm for the plaintiff to go to work for them.

Albert R. Bowley, a witness called by the plaintiff, testified that he was on the team with the plaintiff for about two weeks prior to August 11, learning the route; that on Monday, August 12, he saw the defendant, who told him that he had discharged the plaintiff, and asked him if he was willing to go on the route and help him; and that he went on the route Monday morning, in place of the plaintiff, taking the defendant's team, and collecting for him all the laundry work he could get.

The witness testified, on cross-examination, that the plaintiff told him that he had got through work for the defendant Sunday afternoon; and that the reason for it was because the plaintiff insisted upon having his vacation.

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The defendant, on cross-examination, admitted that he instituted the prosecution of the plaintiff for the purpose of getting back his money and his customers. One Wadleigh, a witness called by the plaintiff, testified that the defendant testified in the Police Court of Lynn that his object in instituting the prosecution was to get back his customers and accounts; and that the defendant also testified that he held the plaintiff responsible for all the accounts on the book.

It was admitted that the defendant published the alleged libel, set forth in the second count of the declaration, in the Daily Evening Item; and that that paper had a daily circulation of about ten thousand copies.

The defendant asked the judge to instruct the jury that, upon the evidence offered by the plaintiff, he had failed to prove want of probable cause, and to return a verdict for the defendant upon the first count; and also to instruct the jury that no cause of action was set out in the second count of the declaration, and to return a verdict for the defendant on that count. The judge refused to rule as requested; and the defendant excepted. The case was submitted to the jury, with full instructions, to which no exceptions were taken.

The jury returned a verdict for the plaintiff on both counts; and the defendant alleged exceptions.

J. H. Sisk, for the defendant.

W. H. Niles & G. J. Carr, for the plaintiff.

BARKER, J. 1. The complaint on which the count for malicious prosecution is founded charged the embezzlement of money. It was material for the present plaintiff to show, in support of the count, that he had a right to collect the money from the defendant's customers, and to retain it until the time of the settlement between the defendant and the plaintiff, which the former had appointed for Tuesday, the next day after the collection of the money. The plaintiff's testimony that the defendant, in discharging the plaintiff, told him that he should hold him responsible for every cent there was on his books, and that he would settle with him on Tuesday afternoon, tended to show the plaintiff's right to collect the money. That he communicated to the defendant on Monday the information that he would make a settlement with him on Monday evening was a circumstance

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material to the question whether, when, on Tuesday morning, the defendant instituted the prosecution, he had reasonable cause to believe the plaintiff guilty of embezzlement. As the communication was through a third person, who testified that he delivered it on Monday to the defendant, the plaintiff's testimony that he instructed the third person to make the communication was competent, and was properly admitted.

2. The other exception relating to this count is to the refusal to instruct the jury that, upon the evidence offered by the plaintiff, he had failed to prove want of probable cause, and to return a verdict for the defendant upon the first count. Assuming that the defendant introduced no evidence, and that the evidence offered by the plaintiff was not in dispute, it was sufficient to show want of probable cause for the institution of the prosecution. The defendant discharged the plaintiff from his service on Sunday, informing him at the time that he should hold him responsible for every cent there was on his books, which implied that, if not already collected from the customers, it must be got in, and that he would settle with him on Tuesday afternoon. On being informed on Monday that the plaintiff would settle with him on that evening, the defendant declined, and caused the plaintiff to be arrested on Tuesday morning on the charge of embezzlement, which was founded upon the plaintiff's having collected on Monday the one dollar and sixty cents, and converted it to his own use, and the defendant himself admitted that he instituted the prosecution for the purpose of getting back his money and his customers, and he had testified in the hearing upon the complaint that he held the plaintiff responsible for all the accounts on his books. All this was enough to show want of probable cause for the prosecution, and in submitting the case to the jury the presiding justice in effect so ruled.

3. The request to instruct the jury that no cause of action was set out in the count for libel was in effect a request to rule, as matter of law, that the published words were not defamatory. It is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot be reasonably understood in any defamatory sense, that such a ruling as that requested can be given. *Twombly* v. *Monroe*, 136 Mass. 464. Odgers, Libel & Slander, (2d ed.) 25. This pub-

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lication could be reasonably understood to mean that the plaintiff had forfeited the defendant's confidence, had perpetrated a transaction characterized as a "scoop," to which right-minded people generally, constituting the public, would not be a party, and that the public should form of him a bad opinion. The request was rightly refused. It was the duty of the presiding justice to submit the count to the jury upon the evidence, and the bill of exceptions states that it was submitted to them with full instructions, to which no exception was taken.

Exceptions overruled.

MARY A. OLIVER *vs.* WALTER F. OLIVER.

Middlesex. November 8, 1897. — November 24, 1897.

Present: KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Divorce — Imprisonment for more than Five Years — Statute.

The libellee, in a libel for divorce, who was sentenced to imprisonment at hard labor in the state prison for not more than six years nor less than three years, was sentenced to imprisonment for more than five years within the meaning of Pub. Sts. c. 146, § 2.

LIBEL FOR DIVORCE, filed October 16, 1896, upon the ground that the libellee had been sentenced to confinement at hard labor for five years or more in the state prison. Trial in the Superior Court, before *Hardy*, J., who found that on July 2, 1896, the libellee was convicted of the crime of breaking and entering a dwelling-house with the intent to commit larceny therein, and was thereupon sentenced by a judge of the Superior Court to confinement at hard labor in the Massachusetts state prison for not more than six years nor less than three years, and was thereupon confined in said prison pursuant to the sentence.

The judge ruled that the above sentence was not a sentence to confinement at hard labor for five years or more in the state prison, within the meaning of Pub. Sts. c. 146, § 2, and ordered a decree to be entered dismissing the libel, and, at the request of the libellant, reported the case for the determination of this court.

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If, as matter of law, the order was wrong, the decree was to be reversed, and a decree entered granting the libel as prayed for; otherwise, the decree was to stand.

C. R. Morse, for the libellant.

No counsel appeared for the libellee.

KNOWLTON, J. A sentence of a married person to confinement at hard labor for life, or for five years or more in the state prison, or in a jail or house of correction, is made a ground for obtaining a divorce in favor of the husband or wife of the person so sentenced. Pub. Sts. c. 146, § 2. Prior to the passage of St. 1895, c. 504, there was hardly a possibility of question in regard to the length of the time for which sentence was imposed. The first section of this statute is as follows: "When a convict is sentenced to the state prison, otherwise than for life, or as an habitual criminal, the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict may be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offence of which he is convicted, and the minimum term shall not be less than two and one half years." Then follows a provision authorizing the prison commissioners, with the approval of the Governor and Council at any time after the expiration of the minimum term to issue to the convict a permit to be at liberty upon such terms and conditions as they shall deem best, with power in them to revoke the permit at any time previous to the expiration of the maximum term for which he may be held under the sentence. The violation by the holder of a permit of any of its terms or conditions immediately renders it void. If a permit is revoked or becomes void, the commissioners of prisons may issue an order authorizing the arrest of the holder of the permit and his return to the prison. When returned he is to be detained according to the terms of his original sentence, and the time between his release upon the permit and his return to the prison is not computed as a part of the term of the sentence.

The libellee was sentenced to the state prison under this statute for not less than three or more than six years, and the question is whether he was sentenced for five years or more,

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within the meaning of Pub. Sts. c. 146, § 2. If this provision of the Public Statutes is hereafter to have any application to sentences to the state prison otherwise than for life or for the punishment of habitual criminals, the sentences must be deemed to be, for the purpose contemplated by this statute, either for the maximum or for the minimum term. They are indeterminate, and they cannot be treated as sentences for any intermediate term. In the interval between the two dates fixed is the convict under sentence to imprisonment or not? He is all the time in the custody of the law under his sentence. He is in confinement at hard labor, unless for good reasons a permit to be at liberty on certain terms and conditions is given to him by the commissioners of prisons. If he obtains such a permit, it may be revoked at any time, and if any of its terms or conditions are broken it becomes *ipso facto* void. He is certainly under sentence during the whole of the maximum term. After the expiration of the minimum term the rigor of the sentence is mitigated by the law. If he obtains a permit, which is not revoked, and observes its terms and conditions, he is not confined at hard labor, but it seems more nearly correct to say that his sentence to confinement at hard labor is for the maximum term than to say that it is only for the minimum term. It is not to be presumed that the Legislature, in adopting a system of indeterminate sentences for convicts in the state prison, intended to change the rights of persons under the laws relating to divorce. In our opinion those rights will be best preserved by treating these sentences as in effect during their maximum term rather than only during the minimum term. In the long range permitted by our statutes between the maximum and minimum terms of punishment for many crimes, it is likely that in many cases even of very heinous crimes the minimum term will be less than five years; and if the other construction were given to the statute, this ground of divorce would be taken away in many cases to which, under the former method of imposing sentences, it would apply. If injustice is done to libellees under the construction which we give to the statute, the Legislature can easily furnish a remedy.

Decree for the libellant.

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JOHN F. FOWKES MANUFACTURING COMPANY *vs.* HAMMOND C. METCALF.

Worcester. November 8, 1897. — November 24, 1897.

Present: KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Statute of Frauds.

Of three writings, addressed to A. and signed by B., the first contained the following: "I hereby agree . . . to loan three thousand dollars on second mortgage above twelve thousand dollar mortgage held by D. as trustee for one year at 10% interest"; the second, "Don't forget to mention in the mortgage the right of way over the new property you spoke of"; and the third, "I wrote last night about the driveway you said would go with the mortgage, and some other things that I suggested." *Held*, in an action by A. against B. for breach of contract, the declaration in which showed that the mortgage to B. was to cover, in addition to the land, a right of way appurtenant to adjoining land to be acquired by A., which easement was a material element in the contract, that the writings did not constitute a sufficient memorandum under the statute of frauds, Pub. Sts. c. 78, § 1, cl. 4.

CONTRACT. The amended declaration alleged that the plaintiff, on May 26, 1896, was the owner in fee of certain real estate of great value, consisting of a lot of land and a large building thereon, situated on Southbridge Street, in Worcester, which real estate was subject to certain encumbrances, namely, a first mortgage of about $12,000, a mechanic's lien of about $560, the taxes for the year 1895, then due and payable, of about $210, a second mortgage, upon which there was then due about $1,200, and several attachments made in actions at law then pending against the plaintiff; that it had then nearly completed a large and valuable block upon the land; that it was then in great need of money with which to pay certain of such encumbrances and claims against its real estate, and with which to complete the building and make the same fully ready for business and manufacturing purposes, and for occupancy by tenants, who were then ready to enter into possession of certain parts thereof upon the completion of the same, and with which to carry on its own business of manufacturing; that for the most advantageous and profitable use of such real estate and building

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for the business and manufacturing purposes for which it was alone adapted it was in great need of a right of way from Southbridge Street to the rear part of the building over and upon which to convey to and from the building coal, wood, machinery, fixtures, merchandise, and stock and materials to be wrought and manufactured into merchandise; that there was situated north of and adjoining the plaintiff's estate a certain piece of real estate to and with which belonged a wide and commodious right of way leading therefrom to Southbridge Street, and for the purpose of securing such adjoining estate, with its right of way, the plaintiff had, prior to May 26, negotiated and agreed with the owners of the adjoining estate and way for the purchase thereof, and all the terms and conditions of the purchase were agreed upon, and the plaintiff had on that day a refusal of such adjoining estate and way from the owners thereof; that the only way in which the plaintiff could secure the desired right of way to its lot and building was by the purchase of such adjoining estate and the right of way belonging to it; that on May 26 a contract was made by and between it and the defendant, a part of which was reduced to writing on the part of the defendant, by a writing which contained all the agreements, undertakings, and contract to be performed by the defendant on his part, and which, addressed to the plaintiff and signed by the defendant, was as follows: "I hereby agree, upon proper certificate from Hobbs, to loan $3,000 three thousand dollars on second mortgage above twelve thousand dollar mortgage held by 3 Dewey Brothers as Trustee for 1 year at 10% interest; I further agree that ½ of said loan may be paid me in six months time provided 1 month's notice is given me of intention of reducing loan"; — that the defendant, on the same day, made, signed, and delivered to the plaintiff a further writing, as follows: "When you get ready to make the mortgage say to them I wish a description instead of a reference mortgage. My experience in 2nd mortgages has taught me that it is necessary to mention that the taxes are to be paid punctual, and also the interest on the first mortgage to be paid when it is due. . . . Don't forget to mention in the mortgage the right of way over the new property you spoke of"; — that the defendant further, on May 27, made, signed, and delivered to the plaintiff another writing, containing the follow-

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ing: "Do not go on with papers until the man that furnishes the money looks over the property. . . . I wrote last night about the driveway you said would go with the mortgage, and some other things that I suggested"; — that the above writings contained all the undertakings, promises, and agreements of the contract which, on the part of the defendant, were to be done and performed; that, in consideration of the undertakings, promises, and agreements of the defendant, the plaintiff, upon its part, made and entered into certain promises, undertakings, and agreements, which were fully set forth in the original declaration, and in a certain writing it gave the defendant on May 26, a copy of which it was unable to set forth, as such writing was on that day delivered to the defendant, and had never been seen since by the plaintiff, but which was, as the plaintiff believed, in substance as follows: "We hereby agree to accept loan of $3,000 secured by second mortgage for one year at 10% interest with privilege of reducing loan one half in six months, provided one month's notice is given of intention of reducing loan"; — that the plaintiff had fully informed the defendant prior to May 26 of all the above named facts, as to the purchase of the adjoining estate and the way belonging to it, and as to the advantages to be gained by the plaintiff by the securing of the way, and on May 26, when the writings were made, it was fully understood, agreed, and contracted between the plaintiff and the defendant, as a part of their contract, though not put into the writings, that the plaintiff should and would complete the contract for the purchase of the adjoining estate and way, and should use from the $3,000 which the defendant agreed so to loan to him the sum of $500 towards the purchase, and that the plaintiff should include in its second mortgage to the defendant, to secure the loan of $3,000, the right of way to Southbridge Street, which, by the purchase of such adjoining estate and way, would become the property of the plaintiff; that it was further clearly understood and agreed by and between the plaintiff and the defendant on May 26, and as a part of their contract, though not put into the writings, that the plaintiff should use some of the $3,000 to pay off any encumbrances against the plaintiff's lot and building other than the first mortgage, especially the mechanic's lien, and that it should use some of the $3,000 to complete the building

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and fit it for use and occupancy, and should use the remainder, if any, of the $3,000 as capital with which to carry on its manufacturing business; and that, relying upon such contract with the defendant, the plaintiff was doing and performing all that it was required on its part to do under the contract, and was ready, willing, and able to fulfil its part thereof when the defendant, on June 3, 1896, notified the plaintiff that he would not fulfil his part of the contract, and absolutely refused to perform the contract and broke the same, to the great damage of the plaintiff; and set out in detail the consequential damages relied on.

The defendant demurred to the declaration, on the ground, among others, that the writings set out did not contain a sufficient description of the land, or the interest therein to be conveyed, to satisfy the requirements of Pub. Sts. c. 78.

In the Superior Court the demurrer was sustained, and judgment ordered for the defendant; and the plaintiff appealed to this court.

M. M. Taylor, for the plaintiff.

R. E. Joslin, for the defendant.

BARKER, J. We are of opinion that the order sustaining the demurrer, and the judgment for the defendant thereon, should be affirmed, because the writings constituting the memorandum of the defendant's agreement are not sufficient to satisfy the statute of frauds. Pub. Sts. c. 78, § 1, cl. 4.

These writings are three in number, and the first indicates that the defendant agreed to lend the plaintiff three thousand dollars upon a second mortgage above a twelve thousand dollar mortgage referred to in the first writing. Assuming that the twelve thousand dollar mortgage could be identified by parol, and that the fair construction of this writing is that the land to be mortgaged is that covered by the first mortgage, the declaration shows that the mortgage to the defendant was to cover in addition a right of way to be acquired by the plaintiff; and in none of the writings are there any words sufficient to identify this right of way. It appears from the declaration that this was a material element in the contract, and if the writings signed by the defendant do not identify it, either by themselves or by the contents of other writings referred to therein, when taken in connection with the circumstances under which

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the writings were made, they are not a sufficient memorandum under the statute. The writings signed by the defendant say, "Don't forget to mention in the mortgage the right of way over the new property you spoke of," and "I wrote last night about the driveway you said would go with the mortgage, and some other things that I suggested." They refer to no writing describing or defining this right of way or driveway. It appears from the declaration that it was not a way then appurtenant to the land covered by the twelve thousand dollar mortgage, and so not made certain or described by the reference to that mortgage. No other writings are referred to in those signed by the defendant. The only reference, therefore, through which a description of the right of way or driveway can be arrived at is to oral statements of some person representing the plaintiff, and who upon some occasion spoke of the right of way, and said that the driveway would go with the mortgage. There are no allegations in the declaration upon which it could be found that some definite right of way or driveway was meant, and that only that right of way or driveway could, under the situation of the parties, have been referred to. On the other hand, it is evident that the right to be put into the mortgage did not then exist, and that to be put into the mortgage it must be created by grant of some third person, who could be identified only by parol evidence. The reference to oral statements as in themselves a description of the property is of course of no avail, and it cannot be found from the position of the parties and their relation to the property that some specific way only must have been intended. See *Ryder* v. *Loomis*, 161 Mass. 161; *Freeland* v. *Ritz*, 154 Mass. 257; *Sherer* v. *Trowbridge*, 135 Mass. 500.

Nor is the general allegation sufficient that the plaintiff, relying on the contract, was doing and performing all that he was required to do on his part under it. *Graves* v. *Goldthwait*, 153 Mass. 268, and cases cited.

In placing our decision upon this point we do not consider whether the writings were also insufficient because they did not state the purposes to which, by the agreement set out in the declaration, the money to be lent was to be in part applied. Nor do we intimate that a way belonging to one parcel of land can be made to attach to another distinct parcel by the purchase by the

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owner of the latter of the land to which the way belongs; nor that consequential damages, such as those alleged in the declaration, can be recovered for breach of a contract to lend money.

Demurrer sustained, and judgment for the defendant affirmed.

GEORGE M. ELLIS *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. November 9, 1897. — November 24, 1897.

Present: KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Railroad — Grade Crossing — Action.

While the raising of the gates where a railroad crosses a street may justify a person in attempting to cross, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from using his own faculties and senses to protect himself from danger.

TORT, for personal injuries occasioned to the plaintiff by being struck by the defendant's locomotive engine and tender at Charlestown, in Boston. Trial in the Superior Court, before *Bishop*, J., who directed the jury to render a verdict for the defendant; and the plaintiff alleged exceptions, the nature of which appears in the opinion.

W. M. Lindsay, for the plaintiff.

S. Lincoln & T. Hunt, for the defendant.

BARKER, J. Upon the evidence there was no dispute as to how the plaintiff was hurt. He stood upon the street, upon one side of the railroad, intending to walk upon the street to the other side of the railroad. There were the usual gates, which were down, and a passenger train stood upon the rails next him. The train moved on, and when its rear end had left half of the width of the street free the gates rose, and he started across the railroad. He passed the track which the train had left, and when he stepped upon the other track was struck by an engine and tender backing down upon that track, and moving in the opposite direction from that of the passenger train.

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He was himself a brakeman upon another railroad, and was perfectly familiar with the crossing, knew that the place was one of the busiest on the two great railroads entering Boston from the north, that a very large number of trains crossed there, and that engines and tenders were likely to pass there at almost any time.

The evidence upon which the verdict against him was ordered consisted wholly of his own testimony, and that of another man who was upon the railroad not far from the street, and who saw the plaintiff waiting to cross and as he was struck. So far as the question of the plaintiff's conduct is concerned, the whole evidence was consistent; and there was no conflicting testimony to require the interposition of a jury. The plaintiff's whole account of the matter was, that, after the passenger train had started, he started across, when the gates rose, and as he got right on the in-bound track he was struck, and did not remember anything until he was over to the depot, when he came to, and was taken to the hospital. On cross-examination he said he did not notice the gates on the farther side of the street, and could not say whether they were open, or up or down, and he did not look; that he did not look down on the ground as he walked across the tracks; that he started to go across when the rear car had got about midway across; and that the next thing he knew he was hit.

He did not testify to any thought as to his own safety in crossing, or to any act of observation as to whether or not anything was coming towards him upon the in-bound track, nor that he looked or listened for anything, or that he excercised any care or watchfulness whatever, or did anything whatever to protect himself from danger. At the same time he knew all about the crossing, that it was a very busy one, and that cars might be expected at any time. Nor can there be found from the testimony of the other witness any indication that after the plaintiff started to cross he exercised any care whatever. The witness saw him standing three or four feet outside the gates before the passenger train moved out, then saw him start to walk across, and saw him hit so quickly that the witness had no time to cry out or give warning. The same witness estimated the speed of the engine at from nine to fourteen miles an hour, and testified that no whistle was blown and no bell rung.

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The raising of the gates was no doubt a circumstance which justified the plaintiff in starting to cross the railroad when he did, and he had a right to expect that, if any engine or train was approaching the crossing on the in-bound track, a whistle would be sounded or a bell be rung. But in attempting to cross the railroad he was bound, in the exercise of ordinary care, himself to exercise his own powers of observation, and to take thought for his own safety; and he was not entitled to have his case go to the jury unless there was evidence from which it could be inferred that he did this. No such inference can be drawn either from his own testimony or that of the other witness.

The general rule, that one who attempts to cross a railroad track must use his own powers of observation in a reasonable way to assure himself that there is no danger from approaching trains, is clear; *Chase* v. *Maine Central Railroad*, 167 Mass. 383, and cases cited; and the rule applies to one from whom a train approaching upon a second track is hidden by a train which has just passed. *Bancroft* v. *Boston & Worcester Railroad*, 97 Mass. 275. *Winslow* v. *Boston & Maine Railroad*, 165 Mass. 264. While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact, and the facts that no whistle was sounded and no bell was rung, are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening, and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more as to his own conduct than that he so relied. *Butterfield* v. *Western Railroad*, 10 Allen, 532. *Merrigan* v. *Boston & Albany Railroad*, 154 Mass. 189. *Tyler* v. *Old Colony Railroad*, 157 Mass. 336.

We are of opinion that, as matter of law, there was no evidence from which it could be found that the plaintiff himself exercised due care, and the verdict for the defendant was rightly ordered.

Exceptions overruled.

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RULES

OF THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

1898.

COMMONWEALTH OF MASSACHUSETTS.

AT a sitting of the Supreme Judicial Court holden at Boston on the seventh day of January in the year of our Lord one thousand eight hundred and ninety-eight.

Present:

HON. WALBRIDGE A. FIELD, CHIEF JUSTICE.
HON. CHARLES ALLEN,
HON. OLIVER WENDELL HOLMES,
HON. MARCUS P. KNOWLTON,
HON. JAMES M. MORTON,
HON. JOHN LATHROP,
HON. JAMES M. BARKER,
} JUSTICES.

Ordered, That the Common Law rules of this court* be amended as follows.

The 32d rule is amended by striking out all after the word "docket" at the end of the fifth line.

The 35th, 36th, and 37th rules are repealed.

The 38th rule is amended so that it shall read as follows:

Applications under Public Statutes, chapter 159, section 38, for admission to practice here, shall be referred to the State Board of Bar Examiners, unless the court shall otherwise order.

By the Court,

JOHN NOBLE, *Clerk.*

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* These rules are published in 136 Mass. 589–610, and the amendments in 140 Mass. 609, 610, and 159 Mass. 601. See also 160 Mass. 601.

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ABANDONMENT.

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ACCIDENT.

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ACCIDENT INSURANCE.

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ACCOUNT.

See INSOLVENT DEBTOR; LIMITATIONS, STATUTE OF, 2; REDEMPTION, 4.

ACTION.

1. If the stockholders of a corporation, which has ceased to do business, together with others, form a new corporation which takes the assets of the old corporation, but does not assume to pay its debts, a creditor of the old corporation cannot maintain an action at law against the new corporation, unless the latter has made a new contract to pay his debt. *Ewing* v. *Composite Brake Shoe Co.* 72.
2. Where a bank pays money by mistake to the payee of a check which the bank has been instructed by the drawer not to pay, and there is no suggestion that the check was given to the payee as a gratuity or merely for his accommodation, the bank must first tender the check to the payee before bringing an action to recover the money so paid. *Northampton National Bank* v. *Smith*, 281.
3. If B. receives a deed of A.'s land under an oral contract to convey to A. a farm of greater value, taking back a mortgage upon it for the difference,

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and, after delaying to make such conveyance, finally sells and conveys the farm to a third person without A.'s consent, A. may maintain an action against B. for the value of the first named land, and he is not obliged, before bringing the action, to restore articles of personal property of small value which were to be conveyed to him with the farm, and which he had appropriated before the conveyance by B. *Miller* v. *Roberts*, 134.

4. A. owned land adjacent to an artificial watercourse, and B. owned land through which the water flowed after passing A.'s land. B., who was under a contract with C., from whose mill the water flowed through the watercourse over B.'s land, not to make any erection thereon which would interfere with the flow of the water, constructed a grating across the watercourse on his land, and rubbish put into the water negligently or wrongfully by third persons accumulated on the grating, obstructing the flow, and setting the water back upon A.'s land, to his damage. *Held*, that A. could maintain an action therefor against B. *Babbitt* v. *Safety Fund National Bank*, 361.

5. A person in charge of a horse which is being transported over a railroad, who is riding, according to custom, in the caboose at the end of a freight train, and who is familiar with the motion of such trains, and who, having been told by a brakeman as the train came to a stop that it had reached the place where he wanted to alight, is injured, while walking near the middle of the caboose towards the door without having hold of anything, by a sudden and unexpected movement of the car throwing him down, cannot maintain an action against the railroad corporation for his injury. *Heyward* v. *Boston & Albany Railroad*, 466.

See BOND, 5; BROKER; CARRIER, 2; EASEMENT, 1; FALSE REPRESENTATIONS; INFANT, 1, 2; INSOLVENT DEBTOR; LIBEL, 1; MASTER AND SERVANT, 4, 8, 9–11; PARENT AND CHILD; POOR DEBTOR, 2; RAILROAD, 1; RECEIVER, 1.

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AGENT.

See PRINCIPAL AND AGENT.

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AGREED FACTS.

If a case is submitted to the Superior Court, or to this court, on agreed facts, inferences of fact cannot be drawn by the court. *Gallagher* v. *Hathaway Manuf. Corp.* 578.

See AUDITOR.

AMENDMENT.

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APPEAL.

An appeal from a decree of the Superior Court sitting in equity, where the evidence is not reported, raises the question whether the decree corresponds to the allegations and prayers of the bill, and with the rules of law applicable thereto. *Kerse* v. *Miller*, 44.

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APPURTENANCE.

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ASSAULT AND BATTERY.

See EXCEPTIONS, 15.

ASSESSMENT.

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ASSIGNEE IN INSOLVENCY.

See CONTRIBUTION; INSOLVENT DEBTOR.

ASSIGNMENT.

1. A policy having been issued by a fire insurance company to A., insuring him in a certain sum against loss or damage by fire upon the property described therein, an assignment thereof was made by A. to B., which on the same day was assented to by the company through its secretary. Two days thereafter the property was destroyed by fire. At all times A.

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was the owner of the property, and B. held the policy under the assignment only as collateral security for a sum of money larger than the amount of the insurance. Both the company and its secretary believed that the assignment was an absolute one, and were not aware until after the loss of the relation between A. and B. Proof of loss was made by A. for the benefit of B. There was no by-law of the company relating to the assignment of a policy for collateral security. *Held*, on a petition to establish the claim, which had been disallowed by the receiver of the company, that the assignment was to be construed according to the intention of A. and B.; that it left A. the insured; that the fact that B. did not have an insurable interest was immaterial, and that neither he nor A. was estopped from relying upon the company's assent to prevent the avoidance of the policy by the assignment. *Merrill* v. *Colonial Mutual Fire Ins. Co.* 10.

2. A. made an assignment of his property in trust for the benefit of his creditors, which provided for their assent thereto. The executors of the will of A.'s father had, as authorized by the will, lent money of the estate to A., and held, as evidence of the loans, two promissory notes, one being the personal note of A. and the other the note of a firm composed of A. and B., and indorsed by A. before delivery; and the executors assented to the assignment as follows: "We signify our assent to the terms of said assignment as creditors of said A., expressly reserving all rights and remedies against any and all persons liable on our claim as maker, indorser, guarantor, or otherwise." *Held*, that the assent of the executors was to be construed as showing their intention to release A., but to reserve their rights against B. and to any security which they had. *Haskell* v. *Hill*, 124.

3. A. made an assignment of his property in trust for the benefit of his creditors, which provided that, if any creditor held security which under the insolvency law would be applicable to his claim, he should be entitled to a dividend on only so much as might remain after deducting from it the proceeds received from a sale of the security. By the will of A.'s father, he became entitled on its final distribution to one third of the estate, which was held in trust under the will; and the estate was inventoried at more than $20,000. The will authorized the executor to loan to A. a sum not exceeding an amount named, "such sum so loaned . . . with interest thereon not paid upon the final distribution of my estate, to be deducted from his share thereof"; and nominated the executor as trustee also, and authorized the trustee to continue the loans. The executor, who had not been appointed trustee by the Probate Court, lent certain sums to A., with the knowledge and consent of all parties interested in the estate, and took promissory notes of A. therefor. *Held*, that the lien which the executor, by such loans, acquired on A.'s interest in his father's estate was "security" on the estate of A. within the meaning of the insolvency law; and that whether the executor acted as such in matters pertaining to the loans, or as trustee, was immaterial. *Ibid.*

See CONTRACT, 9; RECEIVER, 2; WAY.

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ATTACHMENT.

See Poor Debtor; Trustee Process.

AUDITOR.

If a case is referred in the Superior Court to an auditor to "hear the parties, examine their vouchers and evidence, and state the accounts, and make report thereof to the court, the finding of the auditor to be final on questions of fact," it will be inferred by this court, on appeal from the judgment of the Superior Court, that the parties intended that the auditor's report should be treated as an agreed statement of facts. *Daley* v. *Legate*, 257.

BAILMENT.

See Carrier.

BANK.

See Action, 2; Bond, 1–5; Delivery; False Pretences, 3; Promissory Note.

BETTERMENT.

1. Contributions made by landowners under an agreement with the city by authority of St. 1884, c. 226, by which they release the damages caused by taking their lands for the construction of a way, and pay a part of the cost of such construction and a part of the damages recovered by other landowners, and the city assumes their betterment assessments, are not voluntary gifts to be deducted from the cost of the way. *Atkinson* v. *Newton*, 240.
2. An agreement made under St. 1884, c 226, by which landowners agree to release the damages caused by taking their lands for the construction of a way and to contribute and pay to the city one third of the cost of such construction, "being credited, however, with the betterments assessed on land of those abutters who do not sign this proposal," and further to save the city harmless from damages which any owner who does not sign the offer may recover, "upon being subrogated to and credited with the betterments assessed or to be assessed by said city on such owners respectively," and the city agrees to assume the betterment assessments, does not invalidate such assessment. *Ibid.*
3. An order of a city council for the assessment of a betterment, which, by a clerical error, misstates the amount of the total expense on which the assessment is based, may be amended by substituting the amount of the actual expense, and it is not necessary to give any notice of the amendment, or to reassess the betterment. *Ibid.*

See Eminent Domain, 3, 4; Estoppel.

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BOND.

1. The treasurer of a savings bank was also treasurer of a town and the proprietor of a store, in the rear room of which was the office of the bank. In the front room was a desk at which he was accustomed to do business of the bank and of the town, as well as of himself. He embezzled moneys of the bank and absconded, and afterwards a bond properly executed nearly five years previously, given to secure the faithful performance of his duties as treasurer of the bank, was found with other papers behind the desk on a shelf where he often put papers and books belonging to the bank, as well as others. The shelf was not intended as a permanent place of deposit for valuable papers, but was ordinarily used as a place where articles were left temporarily. In an action by the receiver of the bank on the bond, the treasurer testified that he left the bond on the shelf soon after it was executed, that it passed out of his memory, and that it remained there until it was found after he had absconded. *Held*, that the evidence warranted a finding that the bond was delivered so as to take effect as a binding contract. *Johnson* v. *Gerald*, 500.

2. A bond of the treasurer of a savings bank may become binding without a formal vote of approval by the trustees of the bank. *Ibid.*

3. It is no defence to an action on a bond given by the treasurer of a savings bank, that an attested copy of the bond sent to the commissioners of savings banks was not accompanied by a certificate of the custody of the bond that the original was in his possession, as required by St. 1889, c. 180. *Ibid.*

4. A bond, properly executed, given to secure the faithful performance of the duties of the treasurer of a savings bank, and dated one day before the expiration of five years from the time when a statute took effect requiring such treasurers to give a new bond as often as once in five years, remained in the hands of the treasurer for nearly five years after he returned a copy of it to the commissioners of savings banks, as required by statute, and two of the trustees of the bank signed it as sureties. In an action on the bond, some of the trustees testified that the bond was not presented for approval at any meeting at which they were present, and there was evidence indicating that the memory of some of the witnesses was imperfect and unreliable. *Held*, that there was circumstantial evidence proper for the consideration of the jury tending to show that the bond was to the satisfaction of the trustees. *Ibid.*

5. If a bond, properly executed, given to secure the faithful performance of the duties of the treasurer of a savings bank, remains in his custody for nearly five years, and is found after he has absconded in the place where he kept it with other papers, by the receiver of the bank, although there has been no formal approval of the bond by the trustees of the bank, the bringing of an action on the bond by the receiver is a ratification, if ratification is necessary, of the act of the treasurer in accepting and delivering the bond after delivery which may give it effect as a binding contract, there being no evidence that his action was ever objected to by the corporation, or by any member of the board of trustees. *Ibid.*

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6. *It seems* that, after verdict and judgment upon a bond, at a hearing to fix the amount of the execution, the question of the release of the sureties by the obligee's concealment of facts is not open. *New York Life Ins. Co.* v. *Macomber*, 580.

7. *It seems* that, in an action against the sureties on a bond given to secure present as well as future indebtedness, and executed without inquiry, the fact that the obligee had means of knowing that the principal was indebted is immaterial. *Ibid.*

See FALSE REPRESENTATIONS; POOR DEBTOR, 2; RECORD.

BOSTON.

See ELECTIONS; EMINENT DOMAIN, 5.

BOUNDARY.

1. If the boundary line between the land of two persons holding title under deeds from a common grantor is described as at right angles with a certain street, and if the line is drawn at right angles the boundary of one will be fifty-three and a half feet instead of "about fifty feet" as in the deed, there is no such conflict between the angle and the measurement in the deed as creates an uncertainty to be construed by the acts of the parties, but the angle is the true line. *Iverson* v. *Swan*, 582.

2. The building, by the predecessor of one of two adjoining owners of land holding title under deeds from a common grantor, of a fence which diverges somewhat from the boundary line described in the deeds, and which stands for nineteen years before an alleged trespass by his successor, does not create an estoppel which will bind the latter, nor does the building of several feet of sea wall beyond his boundary line by the other owner, acting under the same mistake as the person first named, raise an estoppel. *Ibid.*

See EVIDENCE, 25; INJUNCTION.

BROKER.

If a broker is employed by the lessee of a building, who desires to be released from his tenancy, to procure a customer to engage to take a new lease on terms assented to by the lessee and the lessor, and secures such a customer, who enters into a covenant to take a lease, and afterwards declines to execute the lease owing to incorrect statements, made by the lessee to him before signing the covenant, as to the duration of a sublease, the broker may maintain an action against the lessee for his commission. *Washburn* v. *Bradley*, 86.

See EXCEPTIONS, 11, 12; TRIAL, 2.

BUILDINGS.

See BROKER; DAMAGES, 3; EVIDENCE, 2; EXCEPTIONS, 14; INJUNCTION; MECHANIC'S LIEN.

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BURIAL.

See PARENT AND CHILD.

CARRIER.

1. A palace car company is bound so to manage its cars as not unreasonably to expose the property of a passenger to an unusual risk of loss by theft or otherwise. *Dawley* v. *Wagner Palace Car Co.* 315.

2. In an action against a palace car company for the loss of a passenger's property by theft, if there is evidence that, while a car of the defendant was standing in the station in a large city in the evening, the porter of the car entered with the plaintiff, and, after putting his travelling bag and other property on the seat of the section for which he had a ticket on the side of the car opposite to that on which passengers were received, opened the window opposite the seat without request and in violation of a local rule of the defendant, and then left the car, the question of the defendant's negligence is properly submitted to the jury; and if it appears that the plaintiff immediately left the car, his wife remaining behind near the seat, and then walking the length of the car and back again, sitting down in the section forward of her own, then walking to the platform of the car to speak to the porter, and then sitting down again in the section forward of and facing her own until the train started, when the loss of the property was first discovered, the question whether the plaintiff and his wife were in the exercise of due care is also rightly submitted to the jury; and it is not the duty of the judge to instruct the jury that the travelling bag was not in the custody of the defendant, but of the plaintiff. *Ibid.*

3. In an action against a railroad company for failure to deliver at E. in this Commonwealth, with reasonable despatch, two steel boilers and fittings and castings, which were shipped to the plaintiff from F., the defendant admitting that the delay in delivery was caused by its negligence in first sending the merchandise to E. in another State, if there is no evidence which fairly tends to show that the defendant had notice of the circumstances attending the ordering of the boilers, or of the nature of the plaintiff's business, and the use to which the boilers were to be put, or of the fact that the plaintiff's mill was stopped or to be stopped for the purpose of making a change in boilers, and such notice cannot be inferred fairly from the character of the property, or from the fact that the old boilers were sent over the defendant's road to the same person who had furnished the new ones soon after those had been shipped, the plaintiff is not entitled to damages, as they could not have been within the contemplation of the parties when the goods were received for transportation, and were not the proximate result of the delay on the defendant's part, except in the single particular of cash expended for "telegrams, time, and expenses looking for boilers, and team for hauling expected boilers." *Swift River Co.* v. *Fitchburg Railroad*, 326.

CASE STATED.

See AGREED FACTS.

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CERTIFICATE.

See BOND, 3.

CERTIORARI.

See ESTOPPEL.

CHECK.

See ACTION, 2; WAIVER, 3.

CITY.

1. Under St. 1896, c. 415, entitled "An Act to amend the charter of the city of Lowell," the city council of that city may remove an executive or administrative officer without a hearing, or without assigning a reason therefor. *Attorney General* v. *Donahue*, 18.
2. Whether the omission to post a copy of an order of removal of an officer by the city council of the city of Lowell, in accordance with a rule of that body which provides that, "with the exception of an order for a joint convention, any order originating in the common council shall be copied, and shall, previous to the hour for calling the meeting to order, be posted in some prominent place in the council chamber, where it may be open to inspection by the members," affects the validity of such removal, *quære;* there having been an attempted compliance with the order after objection was taken, and the objection not having been pressed further, *held* that the removal was valid. *Ibid.*

See BETTERMENT; CONTRACT, 4; EVIDENCE, 2; HIGHWAY, 1, 2.

CODICIL.

See DEVISE AND LEGACY, 6.

COLLATERAL SECURITY.

See ASSIGNMENT, 1; CONTRIBUTION; CONVERSION; EQUITY, 8; PROMISSORY NOTE.

COMMISSIONS.

See BROKER.

COMPLAINT.

See DOG, 1, 2; MALICIOUS PROSECUTION.

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CONDITION.

See CONVERSION; WAIVER, 3.

CONSIDERATION.

See ACTION, 3.

CONSTITUTIONAL LAW.

1. The provisions of Pub. Sts. c. 87, § 12, as amended by St. 1894, c. 155, and § 13, as amended by St. 1894, c. 493, and St. 1895, cc. 288, 429, relating to the commitment of the insane, do not violate the provisions of the Declaration of Rights, Article 12, or the Fourteenth Amendment to the Constitution of the United States, and are constitutional. *Dowdell, petitioner*, 387.
2. The St. 1895, c. 488, entitled "An Act to provide for a Metropolitan Water Supply," is not in violation of the Constitution of the United States or of this Commonwealth. *Burnett* v. *Commonwealth*, 417.

See EMINENT DOMAIN, 10.

CONTINGENT INTERESTS.

See DEVISE AND LEGACY, 4, 6, 10.

CONTRACT.

I. *Making.*

1. If, after a proposal by A. to B., the latter's silence in respect thereto and his subsequent letters and conduct warrant the inference, in an action upon the alleged contract, that he assented to the proposal, and the jury find that such is the fair import of his correspondence and acts, or that A. believed and had reason to believe that B. did assent to it, his secret intention not to do so is immaterial. *Bohn Manuf. Co.* v. *Sawyer*, 477.
2. A conversation between the seller and buyer of goods, which contains nothing more definite than an agreement that the seller will deal with the buyer in such a way as to protect his trade, discloses an arrangement which is too indefinite and too general to be enforceable as a contract. *Marble* v. *Standard Oil Co.* 553.

See BOND, 1, 2, 5; MORTGAGE.

II. *Consideration.*

See ACTION, 3.

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III. *Validity.*

3. A contract to pay a deputy sheriff for his services outside the line of his duty, for which the law allows him no fee, such as for his time, travel, and outlay in order to get information before filing complaints for search warrants for intoxicating liquor, is good. *Studley* v. *Ballard*, 295.

See FRAUDS, STATUTE OF.

IV. *Construction.*

4. A city took A.'s property for the purpose of a public park, and granted him permission to occupy the premises until a certain date, upon condition that interest on the damages to be recovered should be waived from the date of the taking to such other date. A. then executed an indenture with B., by which A. covenanted that B. might occupy the premises in A.'s place for such time as the city had agreed or might agree with A. that they might be so occupied; and B. covenanted that he would pay A. a sum equal to six per cent per annum upon the amount of the damages sustained by A. by the taking of his property, computed from a day named to the end of any term for which the city might agree with A. that the premises might be so occupied. Afterwards the city extended the time during which A. might occupy the premises free from rent, and the damages for the taking were agreed upon between the city and A., judgment was entered for the same, and they were paid before the expiration of such time. *Held*, in an action upon the indenture by A. against B., that the indenture was not to be so construed as to add to the amount of damages determined by the judgment an estimated value of the occupation permitted by the city after the payment of the damages as the total on which the six per cent rental to be paid by B. to A. was to be computed. *Jamaica Pond Ice Co.* v. *Boston Ice Co.* 34.

5. A. and B. executed a contract, which recited that, as A. was joint author with C. of certain publications known as a music course, and coequal owner of the copyrights and electrotype plates of these publications, and as he was also then the sole publisher of the same, he agreed that B. should have the exclusive right to print and publish the same during three years from the date thereof, with the use of all capital invested, appliances, and the like, theretofore used by him in such business; that B. agreed to print and publish the same, to pay all expenses of such printing and publishing, and to pay A. "a sum of money equal to not less than five or more than fifteen per cent, as may be agreed upon, on the net proceeds of said publications, it being understood that such net proceeds are the receipts from all sales after deducting fifteen per cent therefrom as the sum due to said A. and said C. as joint authors and coequal owners of the copyrights and electrotype plates, etc., as well as the cost of manufacture, and that he will contribute the sum of two thousand dollars as further capital to be secured by said A. and returned to said B. at the termination of this agreement"; and that A. and B. agreed "that to terminate this agreement at the end of three years from the date hereof a notice in writing must be given" in a manner specified. Four years later B.

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purchased the interest of C., and subsequently A. gave B. the notice provided therein for the termination of the contract. *Held*, in a suit in equity by A. against B., that B. was entitled to recover the $2,000 named in the contract. *Holt* v. *Silver*, 435.

See ASSIGNMENT, 1, 2; BETTERMENT, 2; EQUITY, 1; INSTRUCTIONS; INSURANCE, 4, 7; LANDLORD AND TENANT; MECHANIC'S LIEN, 1, 5.

V. *Performance and Breach.*

6. There is no evidence in this case of the breach of any contract alleged in the declaration. *Marble* v. *Standard Oil Co.* 553.

See CARRIER, 3; DAMAGES, 1; EQUITY, 2; LIMITATIONS, STATUTE OF, 1; WAIVER, 1, 3, 4.

VI. *Rescission.*

7. If a person enters into a contract, and afterwards seeks to avoid the effect of it on any ground that will entitle him to rescind it, he must first restore what he has received. *Ewing* v. *Composite Brake Shoe Co.* 72.

8. Open and notorious acts by one party to an agreement, known to the other, which are inconsistent with the longer continuance of it, may be considered a termination of it, if it was to continue only during the pleasure of the parties and called for no formal notice to terminate it. *Marble* v. *Standard Oil Co.* 553.

9. One party to a contract, who, by his own act, has put it out of the power of the other party to comply literally with a provision of the contract as to the giving of notice to terminate it, and another holding by assignment from the former, are not entitled, in a suit in equity for breach of the contract, to rely on such non-compliance. *Holt* v. *Silver*, 435.

See ACTION, 3; WAIVER.

CONTRIBUTION.

A banker and broker who held the promissory notes of several of his customers for sale for their benefit fraudulently pledged them at different times as security for his own debt to a person who took them in good faith, for value and without notice, and who from time to time collected enough of these notes, as they fell due, to satisfy the debt of the pledgor, who had become insolvent. One of the makers of the notes demanded the return of his note by the pledgor before it had been pledged, and refused to pay it to the pledgee. *Held*, on a bill in equity for contribution, brought by one of the makers of the notes against the pledgor, the pledgee, and the other makers, that, all the notes being pledged as security for the same debt, the whole loss should be borne by all the makers in proportion to the amounts of the notes so pledged; that the demand for the return of his note by one of the makers was immaterial, and that the assignees in insolvency of the pledgor had no interest or duty in the case. *McBride* v. *Potter-Lovell Co.* 7.

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CONVERSION.

At the trial of an action for the conversion of a carryall, it appeared that the defendant, who held the carryall under a bill of sale as security for a debt, left it with A., who had repaired it; that the defendant agreed with B., from whom he received it, to give up his claim upon it on payment of A.'s bill for repairs, the agreement being made in consideration of a part payment of his debt; that he then gave B. an order to A., which read, "Deliver to bearer my carryall upon payment of charges thereon"; and that B. then went with the plaintiff, carrying the order, to A.'s shop, where a conversation occurred among the three, which was introduced by the plaintiff against the defendant's objection as evidence of a novation which amounted in law to a payment of the bill for repairs, and also as evidence of a delivery of the carryall to the plaintiff. A. testified "that he knew the plaintiff, that he was good for any amount, and that he agreed to accept him as paymaster of the bill for all charges on the carryall." *Held*, that the conversation was competent as part of the *res gestæ*, and that the objection to the instructions of the judge, which allowed the jury to find that the conditions stated in the order upon which delivery might be made were performed, could not avail. *Plummer* v. *Greenwood*, 584.

CONVICTION.

See EVIDENCE, 22.

COPYRIGHT.

See CONTRACT, 5; EQUITY, 2.

CORPORATION.

See ACTION, 1; ESTATES OF PERSONS DECEASED, 2; EVIDENCE, 6, 17; EXCEPTIONS, 19; FALSE PRETENCES, 1; FALSE REPRESENTATIONS; INSURANCE, 1, 3; QUO WARRANTO, 3; RECEIVER.

COSTS.

See DEVISE AND LEGACY, 10.

COVENANT.

See WAIVER, 2, 3.

CREDITORS.

See ACTION, 1; ASSIGNMENT, 2, 3; EQUITY, 5, 8; ESTATES OF PERSONS DECEASED, 2; POOR DEBTOR; WRIT OF ENTRY.

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CRIMINAL LAW.

See DIVORCE; DOG, 1, 2; EVIDENCE, 5–7, 22; EXCEPTIONS, 6; FALSE PRETENCES; INDICTMENT; MALICIOUS PROSECUTION; MOTION TO QUASH; VARIANCE.

DAMAGES.

1. Expenditures by one party to a contract, caused in greater part by apprehension of injury based upon mere rumors, are not recoverable as damages in a suit for breach of the contract. *Holt* v. *Silver*, 435.
2. Although there is no distinct proof, in an action for personal injuries, of the amount of the expenses of the plaintiff's sickness or medical attendance, if it appears that a physician treated him eight times at the plaintiff's house and eleven times at his own office, an allowance by the jury of forty dollars is reasonable. *Scullane* v. *Kellogg*, 544.
3. The measure of damages in an action under Pub. Sts. c. 112, § 214, for the loss of buildings and their contents by fire communicated by a locomotive engine, is not the market value in either case, but the real value of the buildings at the time of the fire, ascertained by taking into account the original cost and the cost of replacing them, and making such allowance as depreciation from use, age, and other like causes, and the condition in which they were, require; and the actual worth of the personal property to the owner, ascertained by considering the cost of the articles when new, the length of time they have been used, and their condition at the time of the fire. *Wall* v. *Platt*, 398.

See BETTERMENT, 1, 2; CARRIER, 3; CONTRACT, 4; DECLARATION; EMINENT DOMAIN, 1–4, 10; EQUITY, 1; EVIDENCE, 19, 20; EXCEPTIONS, 5, 15; LIBEL, 1; POWER, 2.

DEATH.

See EMPLOYERS' LIABILITY ACT, 7, 8; EVIDENCE, 21; NEGLIGENCE, 3; PARENT AND CHILD; RECEIVER, 2.

DECLARATION.

The allegation in a declaration in an action for the wrongful execution of a power of sale in a mortgage of land, that the person to whom the defendant conveyed the premises was a purchaser in good faith, if material, is material only on the question of damages. *Rogers* v. *Barnes*, 179.

See FALSE REPRESENTATIONS; LIBEL, 1, 3; NEW TRIAL; VERDICT.

DECREE.

See APPEAL; EQUITY, 4–6, 9; ESTATES OF PERSONS DECEASED, 1; EVIDENCE, 24; INSURANCE, 3; RECEIVER, 2; REDEMPTION, 3, 4; REVIEW; SUPERIOR COURT, 2.

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DEED.

See ACTION, 3; BOUNDARY; EASEMENT, 1; EQUITY, 3, 4; EVIDENCE, 23-25; EXCEPTIONS, 14; POWER, 3; REDEMPTION, 4; WAY; WRIT OF ENTRY.

DEFINITIONS.

See WORDS.

DELIVERY.

If a sight draft, attached to a sealed package addressed to the drawee of the draft, is sent by mail to a bank for collection with the instruction, "Papers to be delivered only on payment of draft," and the cashier of the bank hands the draft and package to the drawee, at his request, to allow him to open the package and examine its contents, after which he returns the draft and package to the cashier and declines to pay the draft, there is no delivery of the papers, within the meaning of the prohibition in the instruction. *People's National Bank* v. *Freeman's National Bank*, 129.

See BOND, 1, 5; CARRIER, 3; CONVERSION; INSURANCE, 2; REDEMPTION, 3.

DEMAND.

See CONTRIBUTION.

DEVISE AND LEGACY.

1. Where little aid was to be derived from other parts of the will, the court said that the words "in equal shares by right of representation" must be construed to mean in equal shares, taking the bequest *per stirpes*. *Siders* v. *Siders*, 523.
2. A testator, by his will, gave to trustees $300,000, and directed that this sum be set apart as soon as possible, and the income thereof paid to his wife during her life. He also gave a like sum to trustees, and directed that it be set apart as soon as possible, and the income thereof paid to his daughter during her life; and after the decease of either the principal of her trust fund, "as it shall then consist," was to be paid over to certain charities. The will then provided as follows: "But if, by losses or depreciation of my property, it shall be found at my decease insufficient for the setting apart of both the trust funds in full, I direct that, if my wife should first decease, so much of her trust fund shall be then transferred to the principal of the trust fund for my daughter as will make up that deficiency of her fund. . . . The following legacies are to be paid only after full provision of income for my wife and daughter during their respective lives." The executors set apart both trust funds in full, partly in money and partly in securities, and transferred them to the trustees for the benefit of the wife and daughter. The wife died, and

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the securities held in trust for the daughter depreciated in value, after such transfer, so that the fund became less than $300,000. *Held*, that the daughter was not entitled to have the deficiency in her trust fund made up out of the principal of the fund which was held for the benefit of the wife during her life, before such principal was distributed among the charities named as legatees. *Weston* v. *Massachusetts General Hospital*, 76.

3. By his will a testator gave to his wife, three sons, and a grandson each a stated sum at his decease, and the same sum annually for four years next succeeding. By a codicil he reduced the legacies to children and grandchildren, but left unchanged the legacy to his wife. In the will nothing was said as to the source from which the payments were to be made, the codicil providing that the four payments to sons and grandson after his decease "shall be made semiannual, and payable as near the middle of January and July during the four years aforesaid as shall be most convenient to my said executors," the balance of the semiannual income, if any, to be paid to his wife "in addition to the $500 aforesaid bequeathed to her." It appeared that a very large part of his property consisted of railroad bonds, on which the interest was payable semiannually on January 1 and July 1 in each year, that the income reasonably to be expected therefrom was likely to exceed the amount needed to pay these annuities after deducting the sum needed for legacies payable at his decease and that the wife had an estate of her own of $12,000. *Held*, that the four payments to the sons and grandson must be made out of the income, if sufficient, and that, as the codicil said nothing about the annual payments to the wife, they must be paid from capital, and the balance of the income, if any, after the payments to the sons and grandson, were given to her in addition to the annual payments of $500. *Hammond* v. *Hammond*, 82.

4. A testator provided by will that all property coming thereunder to his sons D. and J. should be held in trust, the shares of each son to be a distinct trust, "and the net income of each of my said son's shares shall be paid over to them respectively at convenient periods during their respective lives; and on the decease of my said son D. the principal sum held in trust for him shall be paid to his son D., if then living, and in case of his previous decease the trustees shall pay over said principal sum to my daughter and to my other sons, to be equally divided among them, the issue of a deceased child, other than the issue, if any, of my said son D, taking their parent's share by right of representation; and on the decease of my said son J. the principal sum held in trust for him shall be paid to his issue, if any then living, and otherwise, then to my heirs at law then living." The grandson D. Junior died in the lifetime of his father. *Held*, that the interest of the children in the remainder after the death of D. vested immediately on the death of the testator, and that the fund was to be divided into five equal shares, one for each of the children of the testator other than D. and for the representatives of the deceased children. *Shaw* v. *Eckley*, 119.

5. A testator provided by will "upon the decease of my said daughter, to

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finally dispose of, transfer, pay over, and convey the said trust fund, that is to say, the said real estate on B. Street, or the proceeds of the sale thereof, . . . and in case one or more of her said brothers shall die before her decease, then upon her decease to dispose of and convey the same to her surviving brothers in equal shares respectively, if more than one shall survive her, to their use and the use of their heirs and assigns forever; and if only one shall survive her, then to him, to his use and the use of his heirs and assigns forever; but in case one or more of her brothers dying before her decease shall leave issue which shall be living at the time of her decease, then upon her decease the such issue, if any, shall take the share or shares of its deceased father or fathers, respectively." At the time of her decease four of her brothers were living, and one had died leaving a daughter who was then living, but since deceased, having conveyed her interest to trustees under a marriage settlement. *Held*, that the four brothers and the daughter of the deceased brother were entitled each to one fifth of the proceeds of the fund at the time of her decease, the share of the deceased brother's daughter passing to the trustees under the marriage settlement. *Shaw* v. *Eckley*, 119.

6. The words of a codicil, "all the property coming under my said will from my estate to my sons D. and J. shall be held in trust," etc., were declared by the court to be broad enough to cover anything that might come to them from contingent cross-remainders by another part of this clause of the codicil, and also anything that might come to them directly or from contingent remainders under other clauses of the will, there being nothing contradictory to this in any part of the will or codicil. *Ibid.*

7. A testator made by will no pecuniary bequest to his wife, but gave her his city house for life and the household furniture, etc. absolutely, and his country house for life and the household furniture, etc., the property given for life to be disposed of at her death "as part of the residue of my estate in the manner hereinafter directed concerning the same." He directed that there be deposited with a certain corporation $100,000 for each of his three daughters, the income to be paid to each for life, and upon the decease of each the deposit to be paid over "to her children then living," and the issue of any deceased child by right of representation, and in default of any lawful issue then living of such daughter to be paid over "to my heirs at law, as part of the residue of my estate in the manner hereinafter directed concerning the same." He also directed that $100,000 be deposited with the same corporation for each of his two sons, A. and L., the income of each fund to be paid to each son during life, free from the interference of creditors and without the power of anticipation, and on his decease leaving a will to pay over the whole fund "to the children of such deceased son then living, and to the issue of any deceased child by right of representation, . . . and in default of any issue or children of such son then living" to pay over the fund "to my heirs at law, as hereinafter provided." The residuum included "all such estate, property, funds, and moneys as shall from time to time become part of the residue of my estate, under the provisions of this my will." The testator directed that the residue be divided into so many equal

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shares that there might be one share set aside for "each of my children then living"; and then, after the paragraphs containing the bequests of the residue, he gave one of the shares "to each of my sons living at the time of my decease" absolutely, and also gave one share for each of his daughters living at his decease to trustees. The will also contained an obscurely worded provision as to the *cestuis que trust*. *Held*, on the death of A. leaving a will, that the $100,000 held by the corporation in trust for him during life fell into the residue, and was to be divided into five equal parts, of which one part belonged to A., and was to be paid to the executors of his will, one part was to be paid to L. absolutely, and the three remaining parts were to be paid to the trustees, one part to be held in trust for each of the daughters. *Rotch* v. *Loring*, 190.

8. After giving by will a pecuniary legacy to her "husband's nearest relatives," a testatrix provided, "Should my sister S. survive me I do give and bequeath to her for her personal benefit during her lifetime all the remainder of my property either in moneys, real estate, or personal property, and to be disposed of at her discretion, at her decease to go to my nearest of kin." *Held*, that S. took a life estate in the residue, real or personal, with the power of disposal during life, but with no power of disposal by will, and that on her decease all not disposed of passed to the nearest of kin of the testatrix; that the proceeds of real estate sold by S in her lifetime deposited in a savings bank in three accounts, one in her own name, one in her name as trustee for A., and one in her name as trustee for B., were a part of the estate of the testatrix, the evidence in the case of the deposits in trust failing to show a perfected gift; and that the words "nearest of kin" in the residuary clause meant "nearest blood relations," who were to be determined as of the death of the testatrix and not as of the death of S. *Kenison* v. *Mayhew*, 166.

9. A testator gave by will the income of one full moiety of his estate, real, personal, or mixed, to his son M., and directed that so much thereof as was necessary to afford the son a suitable maintenance and a liberal education should from time to time during his minority be expended for his use, and that the excess of such income should be accumulated and added to the principal for the benefit of the son. After the son reached majority, and until he reached the age of twenty-three years, the son was to receive the whole of the income of this moiety, and upon his reaching the age of twenty-three years the provision was that the son "shall be put in possession of said moiety of my estate with the accumulations thereof, and shall hold the same to him and his heirs forever." The will then contained the following: "Provided, however, that in case my said son shall die having no issue him surviving, or such issue shall decease during minority, then, and in either of such cases, my will is that my sister E. shall have and take the said moiety of my estate and its accumulations hereinbefore given to my said son; and if the said E. shall not then be living, I give said estate, with its accumulations, to the person or persons who shall be my heir or heirs at law." By the second paragraph of the will the testator first gave to his sister E. an estate for her life in the

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other moiety of his estate, real, personal, or mixed, in case she should survive him. At her decease, or if she did not survive him, the testator provided as follows: "I give and devise her share of the moiety of my estate unto my said son M., if he shall then be living, or to his issue if he shall have deceased." Then followed the provision: "Provided, however, that this moiety of my estate shall, in case of the decease of my said son without issue, or such issue shall not attain majority, then at my said son's death, or at the decease of his issue during minority, as the case may be, go to my heir or heirs at law. And also in case my said son shall not have attained the age of twenty-three years at the time of the decease of the said E., the income of this second moiety of my estate, or any part thereof, shall be disposed of in the same manner as I have directed in respect of the income from the first moiety of my estate and its accumulations." The will was executed in 1840; the testator died in 1847, his wife having deceased in 1833; the son named in the will, who was his only child, died testate in 1896, never having had issue, and leaving a widow. The testator's sister E., who never married, died in December, 1859. At the time of the testator's death there were living eight children of his deceased sister S., some of whom were alive when the will was made. There was no reference to S. or her children in the will. *Held*, on the death of the testator's son, that he took an estate in fee in both moieties, with an executory devise over on his death without leaving issue surviving him, and that the property went to the heirs of the testator living at the time of the death of the son, as if the testator had then died intestate, those heirs being the children of S.; that whether the widow of the son was entitled to dower or its equivalent in the property must be determined hereafter, in this or some other proceeding, and that whether the trustee had power to sell the trust property and pay the shares in cash to those entitled, or must divide it specifically, could not now be determined. *Welch* v. *Brimmer*, 204.

10. A testator by will gave his daughter his household furniture, etc. absolutely, and his dwelling-house for life, and he then gave the residue, including the reversion of the dwelling-house, to trustees to pay the net income to the daughter for life. The will further provided: "At and after the decease of my said daughter, I give the said trust premises to her issue, equally to be divided between and among them, if more than one, in fee simple, the children of any deceased child of my said daughter to take the parent's share by representation. If my said daughter shall leave no issue surviving her, the trust premises shall, at her decease, be divided into two equal parts or portions, one of which parts shall go to and be held by the said John T. H. and his heirs in fee forever, and the other part shall be divided among my heirs at law as though I died intestate." The trustees were given power "to sell any and all real estate, of which the trust premises shall be at any time composed," and reinvest the premises. At the time of the testator's decease, in 1867, his wife was not living and his daughter was in her forty-third year. Her husband, who was alive when the will was made, died before the testator. John T. H., who was the only child of the testator's wife by a former

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husband, died in 1880, leaving a wife, and, as his only heir at law, a son J. Theodore H. He gave by will the residuum of his estate to his wife, who died in 1885, leaving as her only heir at law said J. Theodore H. *Held*, on the death of the testator's daughter, that J. Theodore H. took one half of the trust property, and the heirs of the testator, to be determined as of the time of the death of the testator's daughter, the other half; that one half of the real estate could be conveyed directly to J. Theodore H., and it was to be left for the trustees to determine whether they could safely pay one half of the personal property to him, or whether administrators of the estates of John T. H. and his wife should be appointed; that the trustees for the half given to the daughter for life had the power to sell and convert into money the personalty, unless those interested consented to a division, if they were more than one, and the fractions were such that the different kinds of property could not specifically be divided; that as to the realty the power to sell was primarily intended to be used for the purpose of investment, the only duty of the trustees being to settle their accounts and pay over the principal directed in the will; that whether authority could be given to them to sell the real estate and divide the proceeds, if necessary, could not now be determined, as there were no sufficient allegations in the bill on which the question could be decided; and that this was not a case in which taxable costs should be allowed against any party, but if application should be made to a single justice for allowance of costs as between solicitor and client out of the fund, it might be considered by him whether such costs should be allowed, and, if so, whether they should be charged upon the whole fund or only upon the half which went to the testator's heirs at law. *Heard* v. *Read*, 216.

See POWER, 3.

DISCHARGE.

See REDEMPTION, 3.

DISCLAIMER.

See EASEMENT, 2.

DIVORCE.

The libellee, in a libel for divorce, who was sentenced to imprisonment at hard labor in the state prison for not more than six years nor less than three years, was sentenced to imprisonment for more than five years within the meaning of Pub. Sts. c. 146, § 2. *Oliver* v. *Oliver*, 592.

DOG.

1. If one at any time keeps a dog which is not registered, numbered, described, and licensed under Pub. Sts. c. 102, § 80, he is subject to a penalty

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under § 87 of that statute; and, if the complaint charges such a keeping, it is not necessary to go further in the averments and set forth the particular time when such keeping began. As a matter of pleading, the general averment negativing registration, etc., according to the statute, is sufficient. *Commonwealth* v. *Coates*, 354.

2. Where, on a complaint for keeping a dog in violation of Pub. Sts. c. 102, § 80, on May 1, 1897, and on divers other days and times between that day and July 19, 1897, it being the defendant's duty under the statute to have the dog registered on or before the 30th day of April, the court said, the defendant having suggested that evidence of keepership outside of the time alleged could not be considered, that no such question appeared to be raised at the trial, but that the evidence was clearly competent in order to show that he was not authorized to keep the dog on the first day of May for want of a license previously obtained. *Ibid.*
3. It is competent to prove that a dog has a habit of attacking passing teams, in support of a disputed allegation that he attacked a passing team on a particular occasion. *Broderick* v. *Higginson*, 482.
4. At the trial together of two actions of tort, brought one by the husband and the other by his wife, to recover damages for injuries occasioned by a dog, there was evidence of admissions made by the husband, but there was no evidence that the wife was present when they were made, or that she had made such admissions herself. The judge charged the jury that both cases were dependent on one state of facts, and the principles of law applicable to one were applicable to the other, and that, the cases being tried together, the rights of the wife were dependent entirely upon the rights of the husband, and the rights of the husband were dependent upon the rights of the wife; so that if one could prevail the other could prevail. The plaintiffs' counsel asked the judge to rule that "any admissions which the husband may have made not in the presence of his wife cannot affect her rights to maintain her action unless" they should "find such admissions were true"; and that "his evidence and admissions are to be treated the same as the evidence and admissions of any other witness in the case, so far as her rights are concerned." The judge refused so to rule. *Held*, that the ruling requested was correct, and that the ruling given was erroneous. *Ibid.*

DOWER.

See Devise and Legacy, 9.

DUE CARE.

See Carrier, 2; Employers' Liability Act, 6, 9; Evidence, 12; Grade Crossing, 6; Highway, 5; Infant; Master and Servant, 3, 4, 10; Negligence, 1–4, 6; Railroad, 2.

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EASEMENT.

1. If A., by a warranty deed, buys land in a city of B., who has previously connected the house on the land with a public sewer unlawfully, no right so to use the sewer as appurtenant to the land passes by implication, and if A. is compelled to pay to the city a fee for entering the sewer, he can not recover the amount of B.; nor did the city, under St. 1888, c. 324, have a lien upon the granted premises, at the time of the conveyance, for the entrance fee to the sewer, which constituted an encumbrance on the property. *Bumstead* v. *Cook*, 410.

2. Non-user by A. of an easement, accompanied by open and adverse occupation for more than fifty years by B. and his successor, under a claim of title, with a recognition on A.'s part that such claim is well founded, shown by his acceptance and recording of an instrument executed by B. who disclaims therein title to land of A. beyond a line, which line includes the land subject to the easement, and the absence during such period of any claim by A. and his successor of title to or an easement over any portion of the land, will warrant a finding, in a suit by A.'s successor to restrain an alleged trespass by B.'s successor, that the easement has been abandoned. *New York, New Haven, & Hartford Railroad* v. *Benedict*, 262.

See EMINENT DOMAIN, 1–3, 7, 8; EVIDENCE, 19, 20, 23; WAY.

ELECTIONS.

By St. 1896, c. 435, § 4, which gives the election commissioners of Boston authority to recount the ballots cast at a caucus, it is intended that in case of the disputed election at a ward caucus of a member of a political committee, the action of the commissioners on a petition for a recount shall settle the question as to who is elected. *Attorney General* v. *Drohan*, 534.

ELEVATOR.

See LANDLORD AND TENANT.

EMBEZZLEMENT.

See EVIDENCE, 10.

EMINENT DOMAIN.

1. If an easement taken in land under the authority of the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), is "the right to carry and conduct, under the following described lands, and therein to construct, operate, and forever maintain an underground main sewer and connecting sewers, drains, manholes, and underground appurtenances, and to repair

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and renew the same," no right to remove the soil from one part of the system of sewers constructed under the statutes to another, in repairing and renewing the main sewer, is included in the taking. *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, 103.

2. At the trial of a petition for the assessment of damages for the taking of an easement in land under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), where it is contended only in behalf of the Commonwealth that it is bound by the sanctity of a moral obligation not to abandon the work in question, the petitioner is not entitled to have the jury instructed that the Commonwealth is under no contract or obligation to maintain the sewer through the petitioner's land. *Ibid.*
3. If a sewer is constructed, under the authority of the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), through land in a place which has long been used as a way, and is specially adapted to such use, and is located lengthwise through such land, thus rendering it easy and comparatively inexpensive for the owner to drain every part of his land, the jury, in assessing his damages, may find this to be a special and peculiar benefit which may be set off against the damages, although other lands receive similar benefits. *Ibid.*
4. At the trial of a petition for the assessment of damages for the taking of an easement in land under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), it appeared that a large number of buildings had been erected upon the land designed to be used in killing and dressing animals intended for food, and in rendering into useful products the parts unsuitable for food in their natural state, and that, previously to the construction of the sewer, the drainage from these buildings was conducted into a river. There was evidence from which the jury might have found that the drainage was creating a nuisance; that it would have been impossible for the petitioner to continue using the property in this business if the sewer had not been built; and that the property was much more valuable for this use than for any other. *Held*, that instructions in regard to benefits in reference to this use, from which the jury must have understood that they were to consider benefits to the real estate in view of its adaptedness to the petitioner's business and not benefits to such business, were not open to exception. *Ibid.*
5. So far as this court has any judicial knowledge on the subject, the level of the sea at mean low water in Boston Harbor is a certain and stable level for determining grades or heights in the vicinity of Boston. *Burnett* v. *Commonwealth*, 417.
6. The "rights" which St. 1895, c. 488, in the last clause of § 4, authorizes the Metropolitan Water Board to take, in carrying out the powers and duties conferred by the statute, are rights in land. *Ibid.*
7. Section 4 of St. 1895, c. 488, after enumerating the waters, water rights, lands, and other property which the Metropolitan Water Board may take by purchase or otherwise, "any or all of the aforesaid lands to be taken in fee or otherwise, as said board may determine," concludes as follows: "Said board may take any other lands in fee, easements, rights, and other property that said board may deem necessary or desirable for carry-

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ing out the powers and duties conferred upon them by this act." *Held*, that the board was empowered, when it did not deem it necessary to take lands other than those before described in fee, to take such new easements or rights in other lands as it deemed necessary or desirable for carrying out its powers and duties. *Burnett* v. *Commonwealth*, 417.

8. The right taken by the Metropolitan Water Board to fill to a specified grade and perpetually to maintain the filling of certain lands, reserving to the owners thereof the right to dig and maintain below such grade necessary cellars, and to lay and maintain necessary pipes for gas, water, or drainage, in such a manner as not to affect injuriously the water in a reservoir, is a right in land which may be taken under St. 1895, c. 451, § 4. *Ibid.*

9. The intention of St. 1895, c. 442, entitled "An Act to authorize the town of Nantucket to take the island of Muskeget, or certain portions thereof, for public purposes," was not to empower the selectmen to take any land held in its entirety by a clear title by any known person or persons, but to empower them to take any specific part or all of the land of the island which was not clearly held in its entirety by any known person or persons. *Whitman* v. *Nantucket*, 147.

10. The St. of 1895, c. 442, entitled "An Act to authorize the town of Nantucket to take the island of Muskeget, or certain portions thereof, for public purposes," is adequate in its provisions for compensation; and it is constitutional. *Ibid.*

See CONSTITUTIONAL LAW, 2; CONTRACT, 4.

EMPLOYERS' LIABILITY ACT.

1. A building in the process of erection is not a part of the "ways, works or machinery" of a subcontractor, who is engaged in a portion of its construction, within the meaning of the employers' liability act, St. 1887, c. 270, § 1, cl. 1. *Beique* v. *Hosmer*, 541.

2. At the trial of an action for personal injuries occasioned to an employee, it appeared that his glove got caught on a coach or set screw, when he reached in his hand, in a manner not clearly explained, to cut the wire in order to take the reel of wire from the block, and that he had worked for six weeks on the machine, and for two years previously on another machine which differed only in making fewer revolutions a minute and in having a larger diameter. There was nothing to show that the plaintiff was not of full age and average understanding. *Held*, that the risk was an obvious one, and that he assumed it. *Donahue* v. *Washburn & Moen Manuf. Co.* 574.

3. *It seems*, that a set screw which is not out of order, which is a common device for the purpose for which it is used, and which was put on in the usual manner, does not of itself constitute a defect in the "ways, works or machinery," within the meaning of the employers' liability act, St. 1887, c. 270. *Ibid.*

4. A person on a railroad having control of a switch, or of a signal, is not in

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"charge or control" of a train, within the meaning of the employers' liability act, St. 1887, c. 270, § 1, cl. 3. *Fairman* v. *Boston & Albany Railroad*, 170.

5. A station agent on a railroad, whose duty it is to transmit to the men in charge of the trains as they arrive at the station on a certain occasion the orders of a person in charge of the single tracking at this point, is not in "charge or control" of a train, within the meaning of the St. of 1887, c. 279, § 1, cl. 3, if there is nothing to show that he gave any orders or assumed any control. *Ibid.*

6. At the trial of an action under the employers' liability act, St. 1887, c. 270, for personal injuries alleged to have been caused by the negligence of the defendant's superintendent, it appeared that the plaintiff was ordered by the superintendent to help work in a kind of vat used for mixing the pulp in the defendant's paper mill; that as he was stepping from a beam to a ladder in getting over the edge of the vat he slipped and fell; that the beam and inside of the vat were wet, and were made more slippery by soda ash used instead of soap for cleaning; that the plaintiff was an experienced man and knew that soda ash was in common use in the mill, but according to his testimony did not know that it had been used in the vat; and that the only negligence alleged was the failure to warn the plaintiff that soda ash had been used. *Held*, that there was no negligence on the part of the defendant. *Thompson* v. *Norman Paper Co.* 416.

7. In an action under the employers' liability act, St. 1887, c. 270, for causing the death of A., who was killed by an explosion of dynamite in a tunnel where he was at work, it appeared that, after a blast had been exploded in the tunnel, the defendant's workmen, including A. and the person who was in superintendence of the work, returned down the shaft to the tunnel, carrying dynamite with them. The only survivor of the explosion which killed A. testified that, as soon as they reached the tunnel, the superintendent told the witness to go and get the loading stick, which he did, and gave it to another workman, near whom the superintendent was standing; that A. was making connection with wires on the other side of the tunnel and in front of the superintendent; that the witness saw the dynamite placed in the holes, after which the superintendent gave them orders to go after the main wire; that the witness had gone fifteen or twenty feet when the explosion occurred; and that this was from ten to fifteen minutes after they started down the shaft. An expert witness testified that an explosion of dynamite in a hole drilled in a rock heated the rock; that it was dangerous to place dynamite in a rock which was so heated; and that, in his opinion, the second explosion was caused by the heated holes. *Held*, that it was for the jury to determine whether the superintendent was exercising superintendence. *Green* v. *Smith*, 485.

8. In an action under the employers' liability act, St. 1887, c. 270, for causing the death of A., who was killed by an explosion of dynamite in a tunnel where he was at work, two witnesses who saw A. just after the explosion testified that his leg was broken and his body was badly cut

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and bruised, but they did not notice whether or not he was breathing. Of three physicians, to whom hypothetical questions were put, one answered that he should say that A. died without conscious suffering, basing his opinion upon the force of the explosion; and the other two answered that they could not say whether or not A. died without conscious suffering, but on cross-examination stated that it was possible that he died instantly. One witness for the defendants, who saw A. soon after the explosion, testified that A. was laid on a pile of lumber and groaned very plainly, but did not speak, and seemed to be suffering, and he should say that he lived about twenty minutes; and another, who drove an ambulance in which A. was placed, testified that he knew A. "was alive and groaning," and, on cross-examination, that he could hear him breathing, but did not hear him say anything. *Held*, that there was evidence from which the jury might infer that A. died without conscious suffering. *Green* v. *Smith*, 485.

9. In an action for personal injuries sustained by the plaintiff, while in the defendant's employ, by an elevator coming down upon him while he was picking up some papers which had been spilled from an upper story of the building on the bottom of the elevator well, if the defendant's superintendent sent the plaintiff there to do this work, and promised to look out for him while he was so engaged, the plaintiff is entitled to go to the jury upon the questions of negligence on the part of the superintendent, of due care on his own part, and of his assumption of the risk. *Scullane* v. *Kellogg*, 544.

10. In an action for personal injuries sustained by the plaintiff, while in the defendant's employ, by an elevator coming down upon him while he was picking up some papers which had been spilled from an upper story of the building on the bottom of the elevator well, there was some evidence tending to show that the plaintiff had been responsible for the upsetting of the paper; that the defendant's superintendent came to the place where this had happened, and saw the plaintiff and others at work picking up paper; that his purpose was to have the entire matter remedied before he went away; that he knew that some of the paper had been spilled down the elevator well, and that the plaintiff was the person who had spilled it; that he knew that somebody would have to go down stairs and pick up the paper in the well; that he saw the plaintiff go off; that the plaintiff went down stairs and began to pick up the paper in the well, and that after some minutes, and before the superintendent himself went down stairs, the elevator was lowered and came down upon the plaintiff while he was at work there. *Held*, that there was sufficient evidence to entitle the plaintiff to go to the jury upon the question of the superintendent's negligence. *Ibid.*

See EVIDENCE, 18; MASTER AND SERVANT, 5, 12.

ENCUMBRANCE.

See EASEMENT, 1.

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EQUITY.

I. *Jurisdiction and General Principles.*

1. A., who, with three others, composed the firm of A., B., and Company, executed with them an instrument, by which he agreed to sell his interest to them, and they agreed "to make a copartnership contract, to commence on" a day named "for the term of five years, under the firm name of" A., B., and Company, and he was to receive five promissory notes for a certain sum each, running one, two, three, four, and five years from the beginning of the new partnership. On the day named for the formation of the new firm, A. executed another instrument, by which he sold to his former partners, "at this date constituting the firm of" A., B., and Company, "all my right, title, and interest to and in any and all things and property of whatsoever name or nature, in which I have an undivided interest with said" former partners, "as a member of the late firm of" A., B., and Company, "which copartnership expired by limitation on the" preceding day. *Held*, that a bill in equity, under Pub. Sts. c. 76, §§ 6, 7, to enjoin the use of A.'s name in the partnership business after the expiration of the five years, could be maintained; and that he was not entitled to recover profits, but was not limited necessarily to nominal damages. *Lawrence* v. *Hull*, 250.
2. A plea and demurrer to the jurisdiction of this court over a suit in equity for breach of contract, and to compel an account and a performance of the contract in other respects, on the grounds that a suit between the same parties reversed and involving the same subject matter is pending in a United States court, and that the present suit is based upon the copyright laws of the United States, and is exclusively within the jurisdiction of the United States courts, are rightly overruled; and the fact that the contract was terminated when the bill was brought makes no difference. *Holt* v. *Silver*, 435.
3. If an instrument which requires a seal is by accident or mistake executed without one, a court of equity may grant relief by compelling a seal to be affixed, or otherwise. *Gaylord* v. *Pelland*, 356.
4. A decree in a suit in equity, declaring an instrument purporting to be a mortgage of land void for want of a seal, and the proceedings by which it had been sought to foreclose it also void, is not a bar to a subsequent suit in equity by the holder of the instrument to have it reformed. *Ibid.*

See CONTRACT, 5, 9; CONTRIBUTION; EQUITY, 7; EVIDENCE, 24, 25; INJUNCTION; TOWN; WAIVER, 3, 4.

II. *Pleading and Practice.*

5. It is within the discretion of the Superior Court, after the report of a receiver appointed in a suit in equity to dissolve a partnership has been confirmed, and his account allowed, and a dividend ordered to be paid to creditors whose claims have been allowed, to refuse to vacate a decree taking the bill for confessed against the defendant, and permit him to file an answer. Even if such discretion could in any event be revised by this

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court, no facts appear in this case to warrant a revision. *White* v. *White*, 52.

6. Upon an appeal by the defendant from a decree of the Superior Court sitting in equity, where the evidence is not reported, if the findings of fact support the decree, and negative all the objections of fact on the part of the defendant, there is nothing for him to argue before this court except that the decree could not lawfully be passed on the facts found. *Ibid.*
7. The Superior Court, having taken jurisdiction of a bill in equity by one partner against another to dissolve the copartnership, and for the appointment of a receiver to collect the assets and convert the property into money and pay the debts, and having proceeded to do this without objection, is not deprived of its jurisdiction by the mere fact that it turns out that the partnership cannot pay its debts in full. *Ibid.*
8. In a suit in equity to dissolve a partnership and for the appointment of a receiver, a creditor of the firm holding collateral security for his debt, consisting of a promissory note containing a power of sale, may intervene by a petition, asking that the security may be sold and the proceeds applied to the payment of his debt, and that he may be admitted to prove his claim for the residue; and an order for the sale of the security is within the authority of the court. *Ibid.*
9. If an exception to the sufficiency of an answer in a suit in equity is overruled, and no appeal from the order is taken, upon an appeal to this court from the final decree such exception will be considered only so far as it appears that the final decree is affected by the order overruling it. *Burns* v. *Commonwealth*, 417.

See APPEAL; DEVISE AND LEGACY, 10; EQUITY, 2; ESTATES OF PERSONS DECEASED, 1, 2; MASTER IN CHANCERY; REDEMPTION, 3, 4; REVIEW; SUPERIOR COURT.

ESTATES OF PERSONS DECEASED.

1. Where a bill in equity was brought under Pub. Sts. c. 136, § 10, against an administrator more than two years after his giving bond on a claim founded on notes and an account, the court said that it was not important to determine whether a suit on the same claim brought in the United States courts, the defendant's intestate having had personal service, having appeared by counsel, and having sworn to the answer personally, and the plaintiff having had no notice of the death of the defendant's intestate until after the final decree was entered, was void or merely voidable, since the bill told in general language the whole story of the plaintiff's claim and asked for payment of it, without reference to the question whether it was legally presented by the notes and account, or by a judgment in which they were merged. *Ewing* v. *King*, 97.
2. If the averments of a bill in equity brought under Pub. Sts. c. 136, § 10, by a receiver of a foreign corporation against an administrator, are true, — that the plaintiff was not a creditor who waited quietly and carelessly for more than two years after the death of his debtor in this Commonwealth

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when he had no other plan for the recovery of his debt than to seek the debtor at his domicil; that by service of process upon his debtor he had brought him within the jurisdiction of the Federal Court in his own district and was pursuing him there; that the debtor had appeared in court by counsel, and had made an answer which he had sworn to in person; that the plaintiff had prevailed in the Federal Courts, including the Supreme Court of the United States on appeal; that no suggestion had come from any source that the defence, which was all the time being conducted in the name of the defendant's intestate and others, was not in fact conducted by him as well as by his co-defendants, and the defendant at the time of his appointment as administrator was cognizant of the proceedings in court, and from that time until the entry of judgment employed counsel to represent the interests of the estate of his intestate in the litigation, — the claim may be prosecuted as it would have been if the plaintiff had learned of the death of his debtor, and had brought suit against the administrator within two years after his appointment. *Ewing* v. *King*, 97.

3. The Pub. Sts. c. 136, §§ 22, 23, which provide that a debt due to the estate of a deceased person from an heir, devisee, legatee, or distributee of such estate shall be set off against and deducted from the share or claim of such heir, devisee, legatee, or distributee, do not relate to real estate inherited by an heir. *Jones* v. *Treadwell*, 430.

4. Where executors made payments by mistake to the wife of the testator of the whole income, thus throwing the burden of the payments to the children upon capital, and diminishing a fund which belonged to others, the court said that it was proper that she should make the loss good, and to that end the executors were authorized to retain income to make good the payments so made by them. *Hammond* v. *Hammond*, 82.

See DEVISE AND LEGACY, 2-7; POWER, 3.

ESTATE TAIL.

See DEVISE AND LEGACY, 9.

ESTOPPEL.

Persons who lie by and permit great expenditures to be made, the benefits of which they will enjoy, are not to be allowed to avoid responsibility for the payment of any share of such expenditures by afterwards having the proceedings under which they were incurred quashed on certiorari. *Atkinson* v. *Newton*, 240.

See ASSIGNMENT, 1; BOUNDARY, 2; EQUITY, 4; FOREIGN JUDGMENT.

EVIDENCE.

1. Oral evidence is incompetent to contradict the records of a court. *Watts* v. *Stevenson*, 61.

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2. A city ordinance as to street numbers is competent, in an action upon a policy of insurance against loss by fire on goods in a certain building, on the question whether the true official number of that part of the building in which some of the goods were contained was a number other than that appearing there; and the testimony of the city engineer as to the official numbering under the ordinance, with the office maps or plans from which the original numbers, and any changes officially made, can be ascertained by inference, is also competent, there being no formal record of numbers kept. *Westfield Cigar Co.* v. *Insurance Co. of North America*, 382.

3. In an action upon a policy of insurance against loss by fire on goods "contained in brick block situated Nos. 82-90 W. Street," the defence was that goods in a certain room over a store numbered 80 on W. Street were not covered by the policy; and it appeared that the only entrance to the premises from the street was by a doorway numbered 82 on W. Street. A witness was asked whether there was a general custom among insurance agents in that city as to "distinguishing in insurance policies by numbers all lofts and tenements that are up stairs," and, upon answering in the affirmative, was asked what the custom was, to which he replied, "Generally go by the entrance number, those up stairs." *Held*, that the question was competent, and, in the absence of any special request as to the answer, its meaning and weight were for the jury. *Ibid.*

4. Upon an information in the nature of a *quo warranto*, against a person usurping an office from which he has been removed by the city council of the city of Lowell, under St. 1896, c. 415, evidence that in making the removal the city council acted on partisan grounds is inadmissible. *Attorney General* v. *Donahue*, 18.

5. At the trial of an indictment for the murder of a woman, there was evidence that, within about two hours after the murder, the defendant had in his possession money consisting of a ten-dollar bill, a five-dollar bill, and fifty cents in silver; that within about one hour before the murder, and for some time previously, he had no money of any kind; that he gave false and contradictory accounts of the way in which he obtained the bills and silver; and that, while talking of the death of the woman to a prisoner in the jail, he admitted that he had ten dollars of her money. *Held*, that evidence that the deceased, on the day before the murder, received a check of a certain amount and from its proceeds paid bills and made purchases, leaving a balance in her possession consisting of a ten-dollar bill, a five-dollar bill, and some change, and that a search of her house by her sister two days after the murder disclosed only a few cents in money, was proper for the consideration of the jury in connection with the other evidence in the case. *Commonwealth* v. *O'Neil*, 394.

6. At the trial of an indictment for obtaining property by false pretences, evidence that the money obtained by the defendant's fraud was disbursed by a corporation of which he was treasurer, and that he personally received no benefit from it, is incompetent. *Commonwealth* v. *Langley*, 89.

7. At the trial of an indictment for obtaining money of A. by false pretences, alleging that A., at a time and place named, was induced by such pretences to and did pay a certain sum to the defendant, if the evidence

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for the government tends to show, and there is no evidence to the contrary, that A. procured the money alleged to have been paid to the defendant from B. on the day alleged, evidence that, at an earlier date, and before he procured the money in question, A. had been paying large sums of money to other persons, is rightly excluded. *Commonwealth* v. *Sessions*, 329.

8. In an action for false imprisonment, declarations, after the plaintiff's arrest, of the defendant's servant, who made the arrest, are inadmissible in evidence. *Geary* v. *Stevenson*, 23.

9. Evidence that the plaintiff in an action for false imprisonment had never, prior to his present arrest, been arrested or complained of for any crime, and that he had a good reputation, is properly excluded. *Ibid.*

10. A., who was in B.'s employ, was discharged on Sunday, and told that B. would hold him responsible for every cent that there was on his books, and that he would settle with him on Tuesday afternoon. A. communicated to B. on Monday, through C., the information that he would make a settlement with him on that evening, and during the day collected some money which was due from B.'s customers. On Tuesday morning B. instituted a complaint against A., charging him with embezzlement of the money. *Held*, in an action by A. against B. for malicious prosecution, in which C. testified that he delivered A.'s communication to B. on Monday, that A. was properly allowed to testify that he instructed C. to make such communication. *Call* v. *Hayes*, 586.

11. In an action for personal injuries occasioned to the plaintiff, who was a tenant of the defendant, by falling on a step of a staircase attached to the house, another tenant, having been allowed to state that the steps were loose at the time, cannot be allowed to testify that he had fallen on the same step in the same manner before the accident to the plaintiff, and that the condition of the step when he so fell was the same as when the plaintiff was hurt. *Dean* v. *Murphy*, 413.

12. In an action for personal injuries occasioned to the plaintiff, who was a tenant of the defendant, by falling after dark on the step of a staircase which was outside the house and separated from the hall by the rear door, it not being the duty of the owner to light the hallway and there being evidence that the plaintiff was in the exercise of due care, another tenant cannot be asked, referring to the time of the accident, "Was there any light in the hallway?" notwithstanding the statement of the plaintiff's attorney that the question was asked as bearing on the plaintiff's due care. *Ibid.*

13. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged jumping of a table on which boards were placed to be sawed by a circular saw in the plaintiff's charge, a person who has been foreman in the room, and has inspected the table just after the accident, is properly allowed to testify that, about six days later, the condition of the table being the same so far as he knew, he took the bolts out of each end of the table and loosened the back and saw no effect in making the table jump, and his statement is not made inadmissible by the fact that later, on cross-examination, he said that he did not remember that he touched the right hand bolt, especially if, even as quali-

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fied, the evidence tends to contradict the plaintiff's witnesses. *Rorke* v. *Mount Tom Sulphite Pulp Co.* 528.

14. At the trial of an action for personal injuries occasioned to the plaintiff while in the defendant's employ, by the alleged jumping of a table on which boards were placed to be sawed by a circular saw in the plaintiff's charge, a witness who has been foreman in the room is properly allowed to state that the effect of looseness sufficient to permit the saw to strike the sides of the slots in which it revolved would be to drive the table from the saw, not to draw it towards it, having previously stated that he thought he had experience, and had noticed what the effect would be. *Ibid.*

15. At the trial of an action for personal injuries occasioned to the plaintiff while in the defendant's employ, by the alleged jumping of a table on which boards were placed to be sawed by a circular saw in the plaintiff's charge, an expert machinist was asked the following question: "Assuming . . . that the right hand bolt was somewhat loose, the left hand bolt is out completely, and that rear block there is loose enough to have the bolt put right down through into the hole, what effect, if any, could that have on the jumping of the saw table, in consequence of the saw striking the metal or on the saw table?" *Held*, that the question was properly admitted. *Ibid.*

16. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the starting of the power by which a machine was run, while the plaintiff was examining it after a fire had been discovered in it, a question to a witness, who was running the machine at the time of the fire, whether she had ever been instructed concerning the running of it, is rightly excluded, if there is nothing to show that she needed any instructions for the proper performance of her regular duties. *Gilmore* v. *Mittineague Paper Co.* 471.

17. The admissions of the general manager and treasurer of a corporation not made in the performance of his duty as such officer, are incompetent in an action against the corporation for personal injuries received by an employee. *Ibid.*

18. In an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the starting of the power by which a machine was run, while the plaintiff was examining it after a fire had been discovered in it, an offer to show that turning on or shutting off the power was an act of superintendence under the employers' liability act, St. 1887, c. 270, is rightly excluded, it appearing that, at the time of the accident the witness called to prove it had worked in the room only one day, and did not know the defendant's custom and method of business in this particular. *Ibid.*

19. At the trial of a petition for the assessment of damages for the taking of an easement in land under the Metropolitan Sewerage Acts (Sts. 1889, c. 439, and 1890, c. 270), if a witness, who is not a real estate expert and does not know the money value of the petitioner's land, has testified generally to the effect of the taking upon the development of the land and upon its value, it is not error to exclude a question to him as to what percentage of its value a certain strip is affected by the sewer, which strip

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the land along the road through which the sewer is laid, and which he has stated will be impaired in value by the taking if it is not adapted to use for a public highway, upon which question of adaptability there is contradictory evidence. *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, 103.

20. If, at the trial of a petition for the assessment of damages for the taking of an easement in land for the construction of a public sewer, the petitioner contends that the sewer will in a few years become inadequate for the drainage of the territory through which it passes, he shows no ground of exception to the statement of a witness, who has testified in accordance with such contention, that he cannot fix the time within which it will be necessary to make further provision for the drainage, and that it may be within twenty years; nor to the statement of the witness, who is a competent expert, that "both the location and elevation of the new supplementing sewer require it to be put in another place and make a second sewer necessary at a higher elevation and in another part . . . not in connection with this taking." *Ibid.*

21. In an action against a railroad corporation for causing the death of the plaintiff's intestate at a grade crossing, by failure to give the signals required by statute, a witness testified that "what took my attention was the train came along and there was n't any whistle or sound from the train, and I says to myself, 'That 's funny'"; that "it did n't whistle or ring, and I sat there right along until I heard a noise," which noise was explained as one that happened after the accident; and that he heard no electric gong or other sound of warning during the same time. *Held*, that the evidence was sufficient to show absence of signals. *Lamoureux* v. *New York, New Haven, & Hartford Railroad*, 338.

22. If the plaintiff in an action, in cross-examination of a witness for the defendant, puts in evidence a conviction of crime to discredit him, the defendant cannot, upon re-examination of the witness, introduce evidence to explain the conviction. *Ibid.*

23. In an action for obstructing an alleged right of way, if the deed granting the easement is ambiguous, and after the judge, upon the plaintiff's offer, has excluded evidence of a conversation with the grantor after the purchase and while the grantor owned the adjoining land relating to fencing the plaintiff's land, and admitted evidence as to what was then done, if the plaintiff is asked, on cross-examination, whether the grantor declined to furnish fence posts, and answers in the affirmative, the whole conversation may be admitted upon re-examination, the act of declination shown by such conversation being merely a verbal act. *Quigley* v. *Baker*, 303.

24. If a decree in a suit in equity, declaring an instrument purporting to be a mortgage of land void for want of a seal, recites that "the seal now upon said mortgage was placed thereon after its execution and delivery, and without the knowledge or consent of" the mortgagor, and it is not determined and does not appear who placed it there, or under what circumstances it was so affixed, evidence offered by the holder of the instrument, at the hearing of a subsequent suit in equity to have it reformed, that it was the intention of the mortgagor, at the time the instrument was

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executed, that there should be a seal upon it opposite his name, is competent *Gaylord* v. *Pelland*, 356.

25. At the hearing of a suit in equity, if the boundary line between the railroad location of the plaintiff's lessor and the defendant's premises on the west is in dispute, a copy of the record in the registry of deeds of an instrument signed, sealed, and acknowledged in 1849, by the defendant's predecessors in title, reciting their "occupancy of premises owned by the railroad corporation, "particularly those premises situated westerly of the stores and buildings of ours," and disclaiming all right and title "to premises or land of said company which we now occupy or may hereafter occupy, . . . and now admit that the stone walls or underpinning on which our buildings stand is the westerly line of our premises," although not formally running to the corporation, is admissible in evidence. *New York, New Haven, & Hartford Railroad* v. *Benedict*, 262.

See BOND, 1, 4, 7; CONTRACT, 1; CONVERSION; DOG, 2-4; EMPLOYERS' LIABILITY ACT, 8, 10; EXCEPTIONS, 4–9, 13–16; FALSE PRETENCES, 2, 3; HIGHWAY, 4; INFANT, 3; INSURANCE, 6; JURY; MALICIOUS PROSECUTION; MASTER AND SERVANT, 1, 3, 7, 12; PRINCIPAL AND AGENT, 3; REVIEW, 2; TRIAL, 1, 2.

EXCEPTIONS.

1. No exception lies to the refusal to give instructions in the language requested, if they are given in substance and with a qualification which adds nothing that is injurious to the excepting party. *Bohn Manuf. Co.* v. *Sawyer*, 477.
2. A general exception to the charge to a jury brings up for revision only those portions which are inconsistent with the instructions requested. *Miller* v. *Roberts*, 134.
3. The bill of exceptions in this case, which was an action against a town for personal injuries, is to be interpreted as showing that the defendant's offers of proof and requests for rulings related to the condition of the street railway at the time of the accident, and not to its original construction. *Fowler* v. *Gardner*, 505.
4. The bill of exceptions in this case was criticised for setting out immaterial evidence in the form of question and answer at great length, instead of condensing the material portions into a short narrative. It was also said that only the material portions of the charge to the jury, not the whole charge, should be printed. *Roskee* v. *Mount Tom Sulphite Pulp Co.* 528.
5. If a bill of exceptions does not disclose what evidence, if any, was produced at the hearing of a motion for a new trial, made upon the ground that the jury in assessing damages for the plaintiff did not adopt the rule given by the judge in his instructions, and shows that the judge ordered the verdict to be set aside unless the plaintiff would remit a certain sum, which remittitur was made, and does not disclose that the defendant requested any rulings of law or excepted to any given by the judge, the

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exception alleged on the ground that he was entitled to a new trial as a matter of right will be overruled. *Coffing* v. *Dodge*, 459.

6. If, at the trial of an indictment for obtaining money by false pretences and representations, there is no evidence tending to show that the representations alleged were true, the defendant has no ground of exception to the refusal to give an instruction based upon the supposition that they were true. *Commonwealth* v. *Sessions*, 329.
7. If the judge presiding at a trial refuses to instruct the jury, as requested by the defendant, that evidence of verbal admissions should be received by them with great caution, and to give other instructions of similar import, and in his charge states correctly the nature of evidence of admissions and the elements which give such evidence weight, the defendant shows no ground of exception. *Rumrill* v. *Ash*, 341.
8. If a witness at the trial of an action testifies to an important admission made to him by the defendant, and a fact as to the subsequent conduct of the witness brought out in his cross-examination, if left unexplained, would warrant the argument that no such admission was made, and the defendant's counsel states to the judge that he should contend that it was significant, the witness is rightly permitted to explain such fact. *Ibid.*
9. No exception lies to the admission of testimony of a witness for the plaintiff in an action, which is part of a conversation that was important and was admitted without objection, and which contains nothing more than the defendant had previously admitted in his testimony. *Ibid.*
10. If it appears to have been well understood on all hands that one of the parties to an action wished to have the construction of a statute determined by this court, in case the ruling of the presiding justice should be adverse to his contention, it is right to allow his exception, even though no statement was made in express terms that an exception was taken. *Newton* v. *Worcester*, 516.
11. If a broker, who is employed by the owner to sell an estate, brings it to the attention of the person who finally buys it, and obtains from him an offer which is rejected by the owner, and the broker thereupon suspends his efforts, and afterwards another broker, in ignorance of the former's employment, procures from the same person another and substantially different offer, which is accepted by the owner, in an action by the first broker to recover a commission of the owner, exceptions taken by the latter to instructions which did not point out sufficiently the difference between the two offers, and may have misled the jury to find for the plaintiff, will be sustained. *Crowninshield* v. *Foster*, 237.
12. In actions upon several policies of insurance, where it appears that the agent of one of the defendants acted as broker in procuring the policies written by the other defendants, no exception lies to the refusal to rule that he was the agent of the plaintiff in obtaining the insurance, if the instruction given made him the plaintiff's agent as to all the defendants except the one of which he was agent. *Westfield Cigar Co.* v. *Insurance Co. of North America*, 382.
13. An objection to a question to a witness, if on the ground of its form, must be so stated when taken in order to be available upon exceptions. *Ibid.*

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14. An exception to the admission of a question to a witness, where his title is only incidentally involved, whether he is the owner of a building, will not be sustained, if the ground of the objection is that his deed and not his oral statement is the proper evidence of ownership, and is not stated at the time, especially if the deed is afterwards put in evidence. *Western Cigar Co.* v. *Insurance Co. of North America*, 382.

15. A verdict for the defendant in an action for an assault and battery and false imprisonment renders immaterial exceptions to the exclusion of evidence directed to the question of damages. *Geary* v. *Stevenson*, 23.

16. An exception to the exclusion of a question put to a witness will not be sustained, if no offer of proof was made of what the excepting party expected to prove by the answer. *Ibid.*

17. No exception lies to the refusal to give instructions in the terms requested, if they are fully covered by the instructions given. *Ibid.*

18. Under an exception to the instructions given at a trial, "in so far as they conflict with the instructions prayed for," an objection to a particular portion of the charge, to which the attention of the judge was not called is not open. *Fairman* v. *Boston & Albany Railroad*, 170.

19. In an action against a railroad corporation for personal injuries occasioned to a fireman in its employ by a collision, a general exception to the admission in evidence of the rules of the corporation will not be sustained, but if any particular rule was inapplicable, the attention of the judge should have been called to it. *Ibid.*

See EMINENT DOMAIN, 4; EVIDENCE, 20; RECORD.

EXECUTION.

See BOND, 6; POOR DEBTOR; WRIT OF ENTRY.

EXECUTOR.

See ASSIGNMENT, 2, 3; DEVISE AND LEGACY, 3; ESTATES OF PERSONS DECEASED, 4.

EXECUTORY DEVISE.

See DEVISE AND LEGACY, 9.

EXPERT.

See EVIDENCE, 15, 19, 20; MASTER AND SERVANT, 12.

FALSE IMPRISONMENT.

1. If the plaintiff in an action for false imprisonment was innocent of the charge upon which he was arrested by the defendant's servant, and the latter, in making the arrest, was acting solely under the defendant's

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authority, the defendant will be liable, but if the servant was acting solely under the direction of a police officer, and had no authority from the defendant to make the arrest, the latter will not be liable. *Geary* v. *Stevenson*, 23.

2. At the trial of an action for false imprisonment, the plaintiff having been arrested by the defendant's servant, if there is evidence that the servant for the time being was acting under the direction and control of a police officer, the judge cannot rule, as matter of law, that the servant in what he did was acting as the servant of the defendant, but the question is properly submitted to the jury. *Ibid.*

3. In an action for false imprisonment, the plaintiff, who was arrested by the defendant's servant while leaving the defendant's premises, is not entitled to have the jury instructed that, if the servant "arrested the plaintiff, complained of him to the officer on the street, and at the station house caused him to be imprisoned for the purpose of carrying out his employer's instructions to look out for the thieves and protect the property, he was acting within the scope of his employment, and the defendant is liable." *Ibid.*

See EVIDENCE, 8, 9; EXCEPTIONS, 15.

FALSE PRETENCES.

1. It is no defence to an indictment for obtaining property by false pretences that the title to such property, which came into the defendant's possession as treasurer of a corporation, did not pass to himself, but to the corporation. *Commonwealth* v. *Langley*, 89.

2. Upon an indictment for obtaining money by false pretences, it is not necessary to prove that the full amount of money alleged in the indictment was so obtained. *Commonwealth* v. *Sessions*, 329.

3. At the trial of an indictment for obtaining money of A. by falsely pretending that the defendant had positive evidence that money of B. to a certain amount was deposited in a certain bank, and that the defendant had made an arrangement whereby, upon the payment of a certain sum by A. to the defendant, the president of the bank would hold such money of B. subject to attachment upon a certain petition of A.'s daughter then pending, there was evidence of false pretences made the day before the money was paid by A. to the defendant; and that the defendant refused on the next day to tell A., before he paid him the money, the name of the president of the bank. *Held*, that the request for a ruling, "that there were no representations or false pretences when the money was paid, and that the variance is fatal," was rightly refused. *Ibid.*

See EVIDENCE, 6, 7; EXCEPTIONS, 6; INDICTMENT; VARIANCE.

FALSE REPRESENTATIONS.

In an action for false representations, the declaration alleged that the defendant sold to the plaintiff a certain bond purporting to be a first

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mortgage bond of the J. Company, and to induce the plaintiff to buy "falsely represented to him that said bond was good, of full value, a good investment, and secured by the machinery and real estate of the J. Company and of other companies of the value of half a million dollars," and that, believing the representations to be true, the plaintiff purchased the bond, "and said bond was not good, of full value, a good investment, nor was it secured by the machinery and real estate of the value of half a million dollars of the J. Company, or of any other companies, all of which said defendant then knew; . . . said bond was and is of little or no value." The plaintiff did not contend that the representations were intentionally fraudulent, and, on the ground that they were mere matters of opinion, the judge directed a verdict for the defendant. *Held*, that the allegations were actionable. *Whiting* v. *Price*, 576.

See FALSE PRETENCES; INSTRUCTIONS; LIMITATIONS, STATUTE OF, 1.

FEE.

See DEVISE AND LEGACY, 9; POWER, 3.

FIRE INSURANCE.

See ASSIGNMENT, 1; EVIDENCE, 2, 3; EXCEPTIONS, 12; INSURANCE, 2-4.

FORECLOSURE.

See EQUITY, 4; WRIT OF ENTRY.

FOREIGN JUDGMENT.

The determination, by a court of general jurisdiction of another State, of the meaning of a contract and of the proper form of remedy, is conclusive upon this court in an action here upon the judgment. *McMaster* v. *Eagle Life Association*, 539.

FRAUD.

See EVIDENCE, 6, 7; FALSE PRETENCES; FALSE REPRESENTATIONS; INDICTMENT; INSTRUCTIONS; LIMITATIONS, STATUTE OF, 1; WRIT OF ENTRY.

FRAUDS, STATUTE OF.

Of three writings, addressed to A. and signed by B., the first contained the following: "I hereby agree . . . to loan three thousand dollars on second mortgage above twelve thousand dollar mortgage held by D. as trustee for one year at 10% interest"; the second, "Don't forget to mention in the mortgage the right of way over the new property you spoke of"; and the

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third, "I wrote last night about the driveway you said would go with the mortgage, and some other things that I suggested." *Held*, in an action by A. against B. for breach of contract, the declaration in which showed that the mortgage to B. was to cover, in addition to the land, a right of way appurtenant to adjoining land to be acquired by A., which easement was a material element in the contract, that the writings did not constitute a sufficient memorandum under the statute of frauds, Pub. Sts. c. 78, § 1, cl. 4. *John F. Fowkes Manuf. Co.* v. *Metcalf*, 595.

See ACTION, 8.

GIFT.

See BETTERMENT, 1; DEVISE AND LEGACY, 8.

GRADE CROSSING.

1. The objection that the alteration proposed by commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, is in effect a relocation of a considerable extent of the railroad company's tracks, and is more extensive than is warranted by law, cannot prevail, if the alteration, though extensive, appears to be in substance what was contemplated in the original petition, and the court has nothing before it which enables it to see that the purpose could be accomplished in any better or cheaper way. *Westborough, petitioner*, 495.
2. An alteration proposed by commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, may include a change in the position of a railroad station. *Ibid.*
3. Commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, are not required to prescribe in their report a manner of determining the actual cost of abolishing the grade crossing. *Ibid.*
4. Commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, may discontinue so much of public ways as is contained within the land taken for the new location of the railroad. *Ibid.*
5. It cannot be said that the report of commissioners appointed under St. 1890, c. 428, upon a petition for the abolition of the crossing at grade of a highway by a railroad, does not specify the general manner of construction, or prescribe the manner or limits within which the alterations shall be made, in such manner as the law requires, and that it is vague and indefinite as to bridges, and as to extent of grading, if the report calls for three bridges all to be "suitable" and provides the details for their construction, and no particulars are pointed out in respect to which the specifications as to the extent of grading are deemed insufficient, such specifications appearing to the court to be full and precise. *Ibid.*

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6. While the raising of the gates where a railroad crosses a street may justify a person in attempting to cross, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from using his own faculties and senses to protect himself from danger. *Ellis* v. *Boston & Maine Railroad*, 600.

See EVIDENCE, 21; NEGLIGENCE, 3; RAILROAD, 3.

HEIR.

See DEVISE AND LEGACY, 7–10; ESTATES OF PERSONS DECEASED, 3.

HIGHWAY.

1. A mere change of grade in an existing way, or change in the material of which the way is constructed, is not an alteration of the way, within the meaning of Pub. Sts. c. 49, but "specific repairs" on the way; and an order authorizing the work, passed by a city council, which is given by statute exclusive jurisdiction to make such repairs within the limits of the city, is not open to objection, in the absence of a provision of statute or ordinance requiring any particular form of proceeding as preliminary to the adoption of such an order. *Bigelow* v. *Worcester*, 390.

2. Under St. 1896, c. 540, entitled "An Act relative to injuries received on highways resulting from snow or ice," a public way is not to be deemed unsafe by reason of snow or ice thereon, if it would be reasonably safe and convenient for travellers but for the presence of snow or ice thereon. *Newton* v. *Worcester*, 516.

3. If the wrought part of a highway is seventeen feet wide from shoulder to shoulder, having a ditch three feet deep descending from the roadbed at an angle of about forty-five degrees, and the space between the travelled part of the way and the shoulder where the slope of the ditch begins is not more than six or eight inches wide, the way is not defective by reason of its narrowness; but, in an action against the town for personal injuries occasioned to a traveller on the way, it cannot be said, as matter of law, that there was not evidence for the jury that the way was defective for want of a sufficient railing. *Harris* v. *Great Barrington*, 271.

4. In an action against a town for personal injuries occasioned to the plaintiff by an alleged defect in a highway, consisting of a guard rail at a curve in the tracks of a street railway, it is competent for the defendant to show that such a guard rail was necessary to the operation of the railway at the place of the accident; and the defendant is also entitled to a ruling that, if the railway "is constructed in a proper manner, and if in fact the portions of its constructions which may be complained of as defects are necessary to its operation as a street railway, though it or they may be obstacles to travel, or present dangers to those using vehicles, they would not on that account be defects in the way." *Fowler* v. *Gardner*, 505.

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5. Where, in an action to recover damages for the death of a horse caused by an alleged defect in a highway, the question is whether the death was a consequence sufficiently direct and immediate to enable the plaintiff to recover, assuming that the way was defective, and that the person in charge of the horse was in the exercise of due care throughout the whole occurrence, if it appears that the driver reasonably thought that he could get through the mudhole where the accident occurred, and used due care in making the attempt, and after getting stuck in the mud at once made reasonable efforts to extricate the team therefrom, with the help of an additional horse, and having reason to think he could get through, and during this attempt the plaintiff's horse burst a blood-vessel and soon after died, the plaintiff is entitled to go to the jury. *Davis* v. *Longmeadow*, 551.

See BETTERMENT; EVIDENCE, 19; GRADE CROSSING; NEGLIGENCE, 1; RAILROAD.

HOMICIDE.

See EVIDENCE, 5.

HUSBAND AND WIFE.

See DOG, 4; WILL, 2; WRIT OF ENTRY.

IMPLIED GRANT.

See EASEMENT, 1; LANDLORD AND TENANT.

IMPRISONMENT.

See DIVORCE.

INCOME.

See DEVISE AND LEGACY, 3, 9; ESTATES OF PERSONS DECEASED, 4; TRUST AND TRUSTEE, 3.

INDENTURE.

See CONTRACT, 4.

INDICTMENT.

1. An indictment alleged that the defendant, at a time and place named, with intent to cheat and defraud A., falsely pretended and represented to him that the defendant "had theretofore secured and had positive evidence

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that moneys" of B. to a certain amount were deposited in some bank or banking institution or trust company in P., and the defendant "had theretofore made some certain arrangement whereby, upon the payment of" a certain sum to the defendant by A., "the president of said bank or banking institution, or of said trust company, would hold said moneys" of B. subject to attachment on a petition for separate maintenance of A.'s daughter, which was then pending; that A., "believing the said false pretences and representations . . . and being deceived thereby," was induced by reason thereof to deliver, and did, at the time and place named, deliver to the defendant certain bank notes of a specified aggregate value, which the defendant then and there received by means of the false pretences and representations, and with intent to cheat and defraud A., "whereas, in truth and in fact," as the defendant then and there well knew, he "had not theretofore secured and had not positive evidence that moneys of" B. to the amount named "were at the time aforesaid deposited and held in any bank or banking institution, or in any trust company in" P. and he "had not theretofore made any certain arrangement whereby, upon the payment of" the sum named to him by A., "the president of said bank or banking institution, or of said trust company in" P., would hold said moneys of B. subject to attachment on said petition of A.'s daughter. *Held*, that the negation in the indictment of the truth of the pretences and representations was sufficient; and that the form of the indictment was not open to objection. *Commonwealth* v. *Sessions*, 329.

2. The averment, in an indictment for obtaining money of A. by false pretences and representations, that he believed such pretences and representations, if necessary at all, is sufficient, without averring that he believed them "to be true." *Ibid.*

See EVIDENCE, 5–7; EXCEPTIONS, 6; FALSE PRETENCES; MOTION TO QUASH; VARIANCE.

INFANT.

1. If a boy fifteen years old, who for over a month has worked upon a machine having a revolving cylinder and a belt of felting, between which it was his duty to put sheets of paper which had been pasted together, and which, by the motion of the two, were caught and drawn along and dried by the cylinder, which was hot, is injured by having his hand caught in the machine and burnt by the cylinder, he cannot maintain an action against his employer for his injuries, upon the ground of a failure to instruct him of the danger that his hand would be caught if he put it too far in. *Lowcock* v. *Franklin Paper Co.* 313.

2. An intelligent boy nearly sixteen years old, who has never worked in a mill until he is set to work on a machine consisting of an apron upon which wool is placed and which travels over and under a roller having projecting teeth, and who, having been shown how to spread the wool over the apron and told to look out for the roller, is injured, after working several days

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by having his hand caught in the teeth of the roller, will be held to have assumed the risk, and cannot maintain an action against his employer for his injury. *O'Connor* v. *Whittall*, 563.

3. If a boy who is set at work upon a dangerous machine appreciates and understands the risk and works on the machine without objecting to the want of a guard, the fact that the machine might have been safer with a guard is immaterial, in an action by him for injuries received while so working. *Ibid.*

See NEGLIGENCE, 2; PARENT AND CHILD.

INFORMATION.

See EVIDENCE, 4; QUO WARRANTO.

INJUNCTION.

1. If B. constructs a wooden building with a cornice, which at the front corner of the building projects over A.'s land a distance of eighteen inches, some of the window sills also slightly projecting, and B. is under no mistake in regard to the boundary line, except as to whether the line at one end runs to the centre or to one side of a monument about four inches wide, and if, when B. is putting in the foundation stones, A. calls his attention to his duty by telling him that he thinks the wall is over the line, A., having brought a bill in equity and given notice of its filing to B. before the house is completed, is entitled to an injunction against the maintenance of any part of the building over his land; and it is immaterial that A.'s land is used as a driveway, and that he has not suffered any actual damage in the use of his property; and the case shows no such laches as to deprive him of his remedy. *Harrington* v. *McCarthy*, 492.
2. Where it was held that A. was entitled to an injunction against the maintenance of any part of B's wooden building over A.'s land, the court said, in view of the fact that the encroachment of B.'s foundation wall upon A.'s land was unintentional and very slight, that B. when he discovered it after the building was nearly completed, "offered to pay A. any sum he might claim," and A. refused to accept anything but removal, and in view of the further fact that the judge found that no appreciable damage resulted to A., while the removal of the projecting portions of the foundation stones might be difficult and expensive, that equity did not require it to order an injunction on this part of the case, and that A. was left to his remedy at law. *Ibid.*

See EQUITY, 1; TOWN.

INSANITY.

See CONSTITUTIONAL LAW, 1.

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INSOLVENT DEBTOR.

If a debtor sells his stock of goods and receives from the purchaser some money, a promissory note, and an order for a certain sum drawn in favor of a creditor and accepted by the purchaser, and the order is at once delivered to the creditor, who credits the amount on the account which the debtor owes to him, a finding that the order was given as and for a payment at the time will be warranted in an action by the assignee in insolvency of the debtor's estate to recover the amount from the creditor, as such payment, being made within six months before the filing of the petition in insolvency, is a "preference" under Pub. Sts. c. 157, § 96. *Hall* v. *Haskell*, 291.

See ASSIGNMENT, 3; CONTRIBUTION; PARTNERSHIP.

INSTRUCTIONS.

In an action for breach of a contract to invest the plaintiff's money safely, for fraudulent representations as to the investment, and for negligence in such investment, it appeared that the plaintiff, having a less sum in the bank than the whole amount dealt with in the alleged contract, was asked by the defendant if she did not wish to invest her money, and she replied that she did and asked him to get for her some of the investments which he had described to her; that when, from time to time after this interview, he notified her that he had securities for her, she gave him bank checks, sometimes for amounts larger than the face of the securities, until the whole face amount of the securities and of the bank checks was a certain sum on a day named, and that only one of these investments was made within six years next before the date of the writ. *Held*, that instructions which allowed the jury to find that there was an entire contract to invest the whole sum, which was not to be completed until after the date so named, were erroneous. *Coffing* v. *Dodge*, 459.

See CARRIER, 2; CONVERSION; DOG, 4; EMINENT DOMAIN, 2, 4; EXCEPTIONS, 1, 2, 4–7, 11, 12, 17, 18; FALSE IMPRISONMENT, 3; FALSE PRETENCES, 3; HIGHWAY, 4; LIMITATIONS, STATUTE OF; NEW TRIAL; PRINCIPAL AND AGENT, 1; TRIAL, 3.

INSURANCE.

1. A policy of life insurance was issued by a company, in consideration, among other things, of certain quarterly payments for seven years, to be made on the first day of the quarter, with four days of grace, and if at the end of those days the sum had not been paid all rights under the policy were at an end, and the member only could apply for reinstatement, which was not to be granted unless the application was accompanied by a health warrant. The application agreed that the reinstatement, if granted, should not waive forfeiture for future non-payments. For the

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two years and a half during which the policy was running before his death, the insured let the days of grace elapse in all but three instances, and was reinstated upon application and giving a health warrant. A payment fell due on July 4, 1896, with grace on July 8. It had not been made on July 9, on which day the insured was drowned. On July 10, the sum was forwarded to the company in the name of the insured, and was returned with notice that an application for reinstatement was necessary. *Held*, in an action by the beneficiary against the company, that the policy was at an end by its terms; that there was no waiver; and that the provisions of § 2 of St. 1896, c. 515, entitled "An Act relative to assessment insurance corporations," did not apply to the payment in question. *French* v. *Hartford Life & Annuity Ins. Co.* 510.

2. The vendee of goods has an insurable interest therein, although the title remains in the vendor until delivery. *Bohn Manuf. Co.* v. *Sawyer*, 477.

3. On a petition by the receiver of a mutual fire insurance company, praying that an assessment upon the members might be revoked, and that the directors might be required to make a new one under St. 1894, c. 522, § 49, which authorizes this court to make such decrees as under the circumstances justice and equity may require, it appeared that the previous assessment was made in good faith; that no policy holder ever objected to its validity; that the company had issued many policies to non-residents; that nearly all the resident policy holders had paid their assessments before the appointment of the receiver, but only a few of the non-residents had so paid; that the receiver had collected a small sum on the assessments and believed that little more could be collected; that there had been no finding that the assessment was illegal, although the receiver doubted its validity; and that the new assessment, if ordered, would be designed to meet the same losses as the first assessment. *Held*, that justice and equity did not require a new assessment to be made. *Merrill* v. *Old Colony Mutual Ins. Co.* 408.

4. Insurance against fire was effected by A. on goods "contained in brick block situated Nos. 82–90 W. Street." A. occupied the fifth story over stores numbered 84 to 90 on W. Street, and also the fifth story over a store numbered 80 on the same street, the latter being used as his warehouse. The only entrance to these premises from the street was by a doorway numbered 82 on W. Street. In an action by A. upon the policy, the evidence showed that his rooms were part of a large brick block on W. Street, all of which belonged to one owner, and which, by means of alterations made by him long before the policy was written, had become one building commonly known as "W. Block"; and that the owner, without authority, had substituted the number 80 for 82, which was the official city number of that part of the building under A.'s warehouse. *Held*, that it was a question for the jury whether the goods contained in the warehouse were covered by the descriptive clause in the policy. *Westfield Cigar Co.* v. *Insurance Co. of North America*, 382.

5. If an insurance company, without referring to a part of its policy called "reference clause," after receiving a proof of loss, admits its liability for the loss upon all property except that contained in a certain room, and

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denies its further liability solely because the policy did not cover the property in that room, it is not entitled, in an action upon the policy, to a ruling that the plaintiff cannot recover because the "reference clause" has not been complied with. *Westfield Cigar Co.* v. *Insurance Co. of North America*, 382.

6. Where the defence to an action upon a policy of insurance against loss by fire is that the property in a certain room was not covered by the words in the policy "contained in brick block," the plaintiff, to show that his rooms were part of a single brick block, may show its construction, ownership, appearance, and use, and that it bore one name, and was commonly designated by that name. *Ibid.*

7. The attempt of the assured in a policy of accident insurance to cross a railroad track between the cars of a freight train at a place where there is no implied invitation by the railroad company to cross, and when the train is in readiness to be moved, of which fact the assured was aware, although he thought that he had time enough to get across in safety, is a "voluntary exposure to unnecessary danger," within the meaning of the policy. *Willard* v. *Masonic Equitable Accident Association*, 268.

See ASSIGNMENT, 1; EVIDENCE, 2, 3; EXCEPTIONS, 12.

INTENT.

See CONTRACT, 1; EVIDENCE, 24.

JUDGE.

See CARRIER, 2; EXCEPTIONS, 1, 2, 4–8, 10–12, 17–19; INSTRUCTIONS; RECORD; SUPERIOR COURT, 1; TRIAL, 1, 3.

JUDGMENT.

See BOND, 6; CONTRACT, 4; FOREIGN JUDGMENT.

JURISDICTION.

See EQUITY, 2, 7, 8; FOREIGN JUDGMENT; HIGHWAY, 1.

JURY.

Although the statements of some of the witnesses at a trial as to the duration of the blowing of whistles on a locomotive engine appear incredible the jury may think them to be exaggerations rather than intentional misrepresentations, and it is for them to draw such inferences, and to give to the testimony such weight, as they think the appearance of the witnesses

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and the circumstances disclosed by the evidence fairly justify. *Flynn* v. *Boston & Albany Railroad*, 305.

See BOND, 4; CARRIER, 2; EMINENT DOMAIN, 2–4; EMPLOYERS' LIABILITY ACT, 7–10; EVIDENCE, 3; EXCEPTIONS, 1, 2, 4–7, 11; FALSE IMPRISONMENT, 2; HIGHWAY, 3, 5; INSTRUCTIONS; INSURANCE, 4; LIBEL, 4; LIMITATIONS, STATUTE OF; MASTER AND SERVANT, 5, 6; NEGLIGENCE, 1, 2, 5, 7; RAILROAD, 3; TRIAL, 2, 3.

LACHES.

See INJUNCTION, 1.

LANDLORD AND TENANT.

A. became the lessee of a basement room in a building which was entered from the street by doors and steps, and was separated by a brick partition from the engine room, which had an elevator well in the corner next to the sidewalk, and was entered therefrom by a door and steps. In accordance with a provision in the lease, a door was cut through the partition. The lease also provided that A. was to have the use of the elevator for bringing his goods from the chambers of an adjoining estate, which he was expecting to occupy, to the basement. When this lease expired, a new lease was made to A. of the basement room, "also, with one horse power only," (which referred to the elevator,) "rooms numbered 29 and 30 in said building." A. occupied those rooms, which were in the upper part of the building, for the purpose of manufacturing his goods, which were lowered by the elevator to the engine room, and thence carried across to the basement room. The tenancy of rooms 29 and 30 was terminated under a provision in the lease, and after that the lessor prevented A. from using the elevator. *Held*, in an action therefor, that there was no implied grant of a right in A. to use the elevator for hoisting goods from the basement room to the sidewalk and lowering them from the sidewalk to the basement room. *Cummings* v. *Perry*, 150.

See BROKER; EVIDENCE, 11, 12.

LAW AND FACT.

See CARRIER, 2, 3; EMPLOYERS' LIABILITY ACT, 7, 9, 10; FALSE IMPRISONMENT, 2; HIGHWAY, 3, 5; INSURANCE, 4; LIBEL, 4; MASTER AND SERVANT, 5, 6, 10, 12; NEGLIGENCE, 1–3, 5, 6.

LEASE.

See LANDLORD AND TENANT.

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LIBEL.

1. An article in a newspaper, containing the statements that a person named is suspected of murder, and that there are said to be grounds of suspicion, and which is open to the interpretation that it was intended in a veiled way to countenance the suspicion, and also containing the statement that there is a rumor of his confession, is libellous, and its publication is actionable without an allegation of special damage. *Haynes* v. *Clinton Printing Co.* 512.

2. Upon the question whether words published in a newspaper are privileged, as on the question whether they are libellous, the same rule applies to repetitions or insinuations of what is false that applies to false statements directly made. *Ibid.*

3. If the innuendos in a declaration for libel are not borne out by the words in the article complained of, they may be rejected as surplusage, when the words, read as ordinary persons would understand them, are libellous *per se*. *Ibid.*

4. An article published in a newspaper, and signed by B., the proprietor of a laundry, stated that "A. has been in our employ as driver. He left Sunday. . . without notice. Early Monday morning he went over our route, collected our work as usual, and turned it over to C.," a competitor. "He also collected money on our account. We had confidence in this man, as he was well recommended. We hope and expect that most of our customers will return, as we do not believe they would be a party to any such 'scoop' if they knew the circumstances. We understand that negotiations for this deal have been in progress for some time. The public can form their own opinion of a man who will do this, or a firm who will employ him to do it. Pay no money to A. on our account." *Held*, in an action by A. against B. for libel, that the question whether the article was defamatory was rightly submitted to the jury. *Call* v. *Hayes*, 586.

LICENSE.

See Dog, 1, 2.

LIEN.

See Assignment, 3; Easement, 1; Mechanic's Lien.

LIFE ESTATE.

See Devise and Legacy, 7, 8; Power, 3; Redemption, 1, 2.

LIFE INSURANCE.

See Insurance, 1.

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LIMITATIONS, STATUTE OF.

1. At the trial of an action for breach of a contract to invest the plaintiff's money safely, for fraudulent representations as to the investment, and for negligence in such investment, the defence to which is the statute of limitations, if there is no evidence of any concealment of the cause of action by the defendant, except his failure to disclose from the outset certain matters which it is contended the relation in which he stood to the plaintiff made it his duty to disclose, instructions from which the jury must have understood that their finding upon this matter should be in favor of the defendant, unless they found that he had fraudulently concealed from the plaintiff his cause of action, are not open to objection. *Coffing* v. *Dodge*, 459.
2. At the trial of an action against an executor on an account annexed, the plaintiff, to show that there was a mutual and open account current, testified on direct examination that a mare was to be charged to his account, that "that was the agreement and the understanding" with the testator, that the price was to be twenty dollars, and on cross-examination that it was not to be treated as a cash payment, but that "it was to be applied on the account." This was about twelve years before. No credit was given in the account annexed to the declaration, the last item in which was nearly three years before the date of the writ, the defendant did not plead in set-off, and the plaintiff claimed the whole amount. It was agreed that, if the mare was received by the plaintiff as so much money, the plaintiff was not entitled to recover the items prior to the last two, which were the only ones within six years from the date of the writ. The jury returned a verdict for the plaintiff for the full amount. *Held*, that the testimony would justify a finding that there was a mutual and open account current, but that the jury should have been directed to deduct the price of the mare, and to return a verdict for the balance. *Kingsley* v. *Delano*, 285.

See Estates of Persons Deceased, 1, 2.

LOWELL.

See City; Evidence, 4.

MALICIOUS PROSECUTION.

A. was discharged from B.'s employ on Sunday, B. informing him that he should hold him responsible for every cent that there was on his books, and that he would settle with him on Tuesday afternoon. A. sent word to B. on Monday that he would settle with him on that evening. B. declined this offer, and caused A. to be arrested on Tuesday morning upon the charge of embezzlement, which was founded on A.'s having collected on Monday some money due from B.'s customers; and B. testified, in the hearing on the complaint, that he held A. responsible for all the accounts

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on his books. *Held*, in an action by A. against B. for malicious prosecution, in which B. admitted that he instituted the prosecution for the purpose of getting back his money and his customers, that there was sufficient evidence of want of probable cause for the prosecution. *Call* v. *Hoyt*, 586.

See EVIDENCE, 10.

MARSHALLING OF ASSETS

See CONTRIBUTION.

MASTER AND SERVANT.

1. At the trial of an action for personal injuries occasioned to the plaintiff while in the defendant's employ by the starting of the power by which a machine was run, while the plaintiff, who was familiar with the machine, was inside of it making an examination after a fire had been discovered in it, the evidence showed that a woman who was running the machine when the fire broke out gave the alarm by running part way to the superintendent's desk, which was in the room, without first shifting the belt from a tight pulley to a loose pulley on the overhead shaft; that she often shifted the belt in running the machine, and was perfectly competent to do so; and that the superintendent shut off the power from the room, and then started it again without knowing the plaintiff's position. *Held*, that there was no evidence that the defendant was negligent in employing an incompetent servant. *Gilmore* v. *Mittineague Paper Co.* 471.
2. An employer is not called upon to instruct his ordinary employees in regard to their conduct in so unexpected an emergency as the discovery of a fire. *Ibid.*
3. An employer does not owe to an employee the duty of changing a running board in the employer's mill, with the position and length of which board the employee has long been familiar, and which was the same as at the time when he entered the employment; and, in an action for injuries occasioned to him by his inadvertently stepping too near the end of the running board in order to reach forward with his broom to clean a coupling which was about six feet farther on, evidence offered to show that the arrangement was different from that usually furnished in other like establishments is properly excluded. *French* v. *Columbia Spinning Co.* 58.
4. If a person of ordinary intelligence and some experience, who is employed on a machine used for hoisting bales of cotton, having levers with which to start or stop the machine, and wheels with cogs which revolve rapidly when the machine is in motion, is injured by getting his hand into the wheels while trying to grasp the lever to stop the machine, keeping his eye fixed on a suspended bale, and not looking to see where he is putting his hand, he cannot maintain an action against his employer for his injury upon the ground that he was set to work on a dangerous machine without instruction; nor is the machine defective because the wheels are not covered. *Wilson* v. *Massachusetts Cotton Mills*, 67.

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5. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by an explosion of dynamite in a rock where he was drilling, there was evidence tending to show that A. was acting as superintendent in directing the work and telling where holes were to be made; that, two days previously, a hole which had been loaded with dynamite had not been fired, owing to a want of connection of the wire; that this was known to A., who directed the plaintiff to drill a new hole which pointed towards the hole where the dynamite was; and that the explosion resulted from contact with the dynamite in drilling the new hole. The plaintiff testified that he knew nothing of dynamite being in the rock; and there was evidence for the defence that A. had reason to think that this charge had been exploded, and that, before putting the plaintiff to work, he looked to see if he could find any miss-fires, and found none. *Held*, that the plaintiff could not be said, as matter of law, to have assumed the risk, and was entitled to go to the jury upon the question of A.'s negligence. *Dean* v. *Smith*, 569.

6. Where a seaman is injured by the breaking of a triangle on which he was sitting and scraping a mast, in an action against the owners of the vessel for his injury, if there is some evidence that the master, who was an owner, directed the mate to make the triangle out of the boards which he afterwards used for that purpose, but which were not suitable, the plaintiff is entitled to go to the jury as against the master. *Kalleck* v. *Deering*, 200.

7. Whether there were suitable materials on board of a vessel which were intended or could have been used for the purpose of making a triangle, and which in the proper and reasonable performance of their duty the master or the mate could and should have used, was, on the evidence, a question for the jury. *Ibid.*

8. If an employee, whose duty it is to assist another employee in baling felting upon a steam belting press, selects, from a lot provided by his employer, several blocks or joists, and hands them to his fellow employee, who places them in position, and then, in sight and with the knowledge of the first named employee, applies the power, and thereafter, while under pressure so applied, one of the blocks, which was old and bent, flies from its place and injures the first named employee, he must be held to have assumed the risk, and an action for his injuries cannot be maintained. *Maloney* v. *United States Rubber Co.* 347.

9. If a brakeman on a night freight train, who often has gone over the route by night, is injured, while descending from a moving car in the discharge of his duties, by coming in contact with a fence three feet and nine and one half inches from the nearest rail of the track and built on top of a retaining wall running parallel to and within the original survey of the railroad, he cannot maintain an action against the corporation for his injuries. *Ryan* v. *New York, New Haven, & Hartford Railroad*, 267.

10. At the trial of an action for personal injuries occasioned to the plaintiff while in the defendant's employ as a conductor on one of its street cars, it appeared in evidence that, while the car passed in the evening under a low bridge, the trolley had to be disconnected from the wire and con-

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nected again when it emerged; that the car had a closed end, with a window, out of which it was difficult to lean to make the connection, and the plaintiff had stepped around to the outside, and was standing upon a bumper, when he was thrown off by a jolt; that the plaintiff knew that for several weeks the track had been uneven at this point, having been lifted two or three inches by the frost, although according to his testimony the jolt by which he was thrown off was more severe than usual, and that the weather was moist, and the speed of the car greater perhaps on that account. The judge directed a verdict for the defendant. *Held*, that the ruling was right. *McCauley* v. *Springfield Street Railway*, 301.

11. An experienced workman in the employ of a subcontractor, who is doing the carpentry in the construction of a building, cannot maintain an action against his employer for injuries sustained by falling through a hole cut in one of the floors, under the authority of the general contractor, by another subcontractor, for the purposes of his work in concreting the basement, on the ground that the defendant, who knew that the hole was there, ought to have guarded it or warned the plaintiff of it. *Beique* v. *Hosmer*, 541.

12. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the falling of a stone arch when the plaintiff removed the props of the wooden centre on which it had been built, it appeared that he acted by the direction of the defendant's superintendent; that the arch had been built a little more than two days, and there was testimony that this was not a sufficient time for the mortar to harden; that the brick backing had not been put in, nor had the stone been fastened to the floor of the building; and that there was a door a little to one side, the arch over which had not been built, and according to the testimony of an expert the absence of this lateral support probably permitted the pier on which the arch in question stood to give a little when the prop was knocked out. *Held*, that it could not be said, as matter of law, that there was no evidence that the superintendent was negligent in ordering the centre to be removed. *Held, also*, that an expert could properly be asked whether the arch would have fallen, if the conditions above mentioned, the arch of the door, the brick behind the arch in question, and the dryness of the mortar, had been present, and as to the tendency of their absence. *Tremblay* v. *Mapes-Reeve Construction Co.* 284.

See EMPLOYERS' LIABILITY ACT; EVIDENCE, 8, 13–18; EXCEPTIONS, 19; FALSE IMPRISONMENT; INFANT, 1, 2.

MASTER IN CHANCERY.

1. The findings of a master, to whom a suit in equity has been referred, on matters of fact, will not be reversed by this court, unless they clearly appear to be erroneous. *Holt* v. *Silver*, 485.

2. The ruling of a master, and a similar ruling of a single justice at the hearing upon exceptions to the master's report, will not be disturbed on appeal, if all the evidence on the point ruled upon is not before this court. *Ibid.*

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MECHANIC'S LIEN.

1. Where A. contracts with B. to furnish the materials and erect a building on his land, he will be held to have contemplated that B. might sublet a portion of his contract, and labor performed under a subcontract with C. to furnish the labor and materials required for the granite work is performed with A.'s consent. *Daley* v. *Legate*, 257.
2. It is not necessary, in order to establish a mechanic's lien, that the labor should have been performed on the premises where the building was being erected. *Ibid.*
3. The fact that a subcontractor might not have had a mechanic's lien for the labor performed by a person in his employ, or that he has been paid for such labor, does not operate to prevent such person from maintaining a lien, if he has not received his pay therefor from his employer. *Ibid.*
4. If A. employs B. to build a house on A.'s land under a contract which provides that B. shall "not let, assign, or transfer this contract, or any interest therein, without the written consent of the architect," and B. makes a written subcontract with C., by which the latter is to excavate for the cellar, do the grading about the building, and build the foundation walls, referring to the principal contract, upon a petition by C. against A. to enforce a mechanic's lien for his labor, under Pub. Sts. c. 191, although there is no evidence that A. knew that C. made the subcontract or did any work, and no written consent of the architect, a finding that C.'s labor was performed by "consent" of A., within the meaning of § 1, is right. *Perry* v. *Potashinski*, 351.
5. The provision in a contract for building a house, that "the contractor shall make no claim for additional work, unless the same shall be done in pursuance of an order from the architect, and notice of all claims shall be made to the architect in writing within ten days of the beginning of such work," does not refer to or affect a claim of a subcontractor for additional work done by direction of the architect, who had authority to order it, and in pursuance of a change of plan desired by the owner. *Ibid.*
6. Upon a petition to enforce a mechanic's lien, under Pub. Sts. c. 191, for labor furnished under a subcontract to excavate for the cellar of a house, do the grading, and build the foundation walls, the petitioner is not entitled to be allowed for carting away gravel from the cellar, which was done by the city under an agreement with the petitioner that it might have the gravel, which it wanted for roads, if it would carry it off. *Ibid.*

METROPOLITAN SEWERAGE ACTS.

See EMINENT DOMAIN, 1–4; EVIDENCE, 19.

METROPOLITAN WATER SUPPLY.

See CONSTITUTIONAL LAW, 2; EMINENT DOMAIN, 6–8.

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MINOR.

See INFANT.

MISTAKE.

See ACTION, 2; EQUITY, 3.

MORTGAGE.

A mortgage of real estate given to secure the payment of a definite sum of money cannot be held by the assignee thereof as security for other money subsequently advanced by him to the mortgagor, in the absence of an agreement to that effect; and an indefinite understanding that the mortgagor would repay such advances from the proceeds of a sale of a portion of the land subject to the mortgage is not equivalent to such an agreement. *Brooks* v. *Brooks*, 38.

See DECLARATION; EQUITY, 4; EVIDENCE, 24; FRAUDS, STATUTE OF; POWER, 1, 2; REDEMPTION; TOWN; VENUE; WRIT OF ENTRY.

MOTION TO QUASH.

A motion to quash an indictment, the objections stated in which are general and not assigned specifically, as required by Pub. Sts. c. 214, § 25, is rightly overruled. *Commonwealth* v. *Langley*, 89.

MUNICIPAL CORPORATION.

See BETTERMENT; CITY; TOWN.

NAME.

See EQUITY, 1.

NANTUCKET.

See EMINENT DOMAIN, 9, 10.

NEGLIGENCE.

1. In an action against a town for personal injuries occasioned to the plaintiff by an alleged defect in a highway while driving thereon, he testified that, hearing a team coming behind him, he turned to the right side of the travelled part of the way to let it pass; that his horse, which was a gentle one, shied at something, sprang back, and jumped off the road into a ditch at the side; and that, seeing that his wagon was likely to upset, he turned the horse short across the ditch so as to go off straight and not sideways

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Held, that it was for the jury to say whether, if there was any loss of control of the horse, it was or was not momentary, and whether the plaintiff was in the exercise of due care. *Harris* v. *Great Barrington*, 271.

2. A boy ten years old was injured, while attempting to cross the street in front of his home, by stepping with his bare feet on a heated rail belonging to a street railway corporation, which was engaged in welding the ends of the rails of its road together. These ends were heated by electricity, and then welded together by a machine which was driven along the track to the joints of the rails, the pavements having been taken up and the earth excavated for a short distance on each side of the rail. It took about half an hour to cool the rails after heating. The rail in question had so far cooled that it was black, and there was no flag or wooden horse to notify one of any danger. *Held*, in an action against the corporation for the injury, that the questions of the plaintiff's due care, and of the defendant's negligence, were for the jury. *Kane* v. *West End Street Railway*, 64.

3. Where the evidence in an action against a railroad corporation for causing the death of A., whose team collided with a train at a grade crossing, shows that the view of the track, in approaching it from a highway over a bridge, was more or less obstructed; that his son, who was fourteen years old and drove on this occasion, A. being blind but not deaf, both looked and listened for a train before entering upon the bridge, but saw and heard none; that when reaching the end of the bridge, twenty-two feet from the track, the son first saw the flagman, who was coming from his shanty between the bridge and the track with his flag furled, but who said nothing; that the son at once tried to stop his horse, but it went upon the track; and that he then heard the approaching train for the first time and struck the horse in order to get across, and the collision resulted, — it cannot be said, as matter of law, that there was no evidence of due care on the part of A. and his son. *Tilton* v. *Boston & Albany Railroad*, 253.

4. In an action against a railroad corporation for injuries occasioned to the plaintiff's person and property by the alleged negligence of the defendant's servants in blowing the whistle on a locomotive engine improperly, it appeared that the plaintiff, at the time of the accident, was employed with his horse and cart in carrying dirt from an embankment to a highway running parallel to and about seventy feet distant from the defendant's railroad; that he had just dumped a load of dirt when the whistle on the engine of a gravel train which was standing on the railroad was blown, frightening the plaintiff's horse, which started to run, and he, after attempting to hold him, was thrown against a post and injured; and that the horse had worked there for two weeks, and the plaintiff's witnesses testified that the horse had not been afraid of the whistling before this occasion. *Held*, that there was evidence that the plaintiff was in the exercise of due care, and that the horse was safe and gentle. *Flynn* v. *Boston & Albany Railroad*, 305.

5. If persons are at work with horses in close proximity to a railroad upon which a gravel train is standing, and they are seen by the employees upon the train, it is a question for the jury, in an action against the corporation

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for injuries caused by one of the horses becoming frightened by the alleged careless blowing of the whistle on the engine, whether or not it was negligence on the part of the engineer to give at this time by the whistle certain signals which had been established by the corporation. *Flynn* v. *Boston & Albany Railroad*, 305.

6. It cannot be said, as matter of law, in an action against a railroad corporation for personal injuries occasioned to a fireman on a locomotive engine by a collision between the engine and a snowplough, that he was negligent in not seeing a signal, if the evidence is that, at the time of the collision, the air was filled with driving snow, so that it was impossible at times to see anything. *Fairman* v. *Boston & Albany Railroad*, 170.

7. A railroad had two main tracks, one called the north track, which was regularly used for trains going west, and the other the south track. On the occasion of a severe snowstorm, the north track was blocked with snow between B. and W., and the trains going each way were using the south track between those stations. C. had charge of the single tracking between such stations, and had given an order, which was obeyed, to hold all east-bound trains at W., west of a cross-over switch leading from the south track to the north track, several hundred feet west of W. He then gave an order in writing to the engineer of a west-bound train which allowed him to go only to W. The cross-over switch was not in position to allow a train to pass from the south track to the north track, and the train proceeded without stopping and collided with a snowplough standing on the south track, and the fireman on the engine was injured. There was evidence that the air was filled with driving snow so that at times a signal could not be seen. *Held*, in an action against the railroad corporation for the injury, that, although there was not a literal compliance with the rules of the corporation, it could not be said that there was any negligence on C.'s part which contributed to the accident, nor anything to show that he was bound to give minute directions to the person in charge of the switch at W. as to the setting of the switch. *Held*, also, that the jury might have found that the engineer of the train was negligent, in continuing to run upon the south track without seeing whether or not a proper signal was out, showing that track to be safe. *Ibid.*

8. In an action against a railroad corporation for personal injuries occasioned to a fireman by reason of the engine on which he was employed colliding with a snowplough standing on the track, one count in the declaration charged negligence of some person in the defendant's service who had the charge or control of a switch upon its railroad, specifying the negligence as not notifying the plaintiff, or the person who had the charge or control of the train, that the switch was not properly set to cross from one track to another, called the north and south tracks. The evidence showed that C., who had charge of the switch house, after a preceding train had passed from the south track to the north track, changed the switch so that a train going in the same direction would not cross over to the north track, but would continue on the south track, and there was also evidence that this was negligence on his part; but it appeared that the act of changing the switch showed a signal that a train could not cross

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over. *Held*, that the defendant was entitled to a ruling that the plaintiff could not recover on that count. *Fairman* v. *Boston & Albany Railroad*, 170.

See ACTION, 4, 5; CARRIER, 2, 3; DAMAGES, 2, 3; EMPLOYERS' LIABILITY ACT; EVIDENCE, 11–18, 21; EXCEPTIONS, 3, 19; GRADE CROSSING, 6; HIGHWAY, 2–5; INFANT; INSTRUCTIONS; LIMITATIONS, STATUTE OF, 1; MASTER AND SERVANT; RAILROAD.

NEGOTIABLE INSTRUMENTS.

See ACTION, 2; CONTRIBUTION; DELIVERY; PRINCIPAL AND AGENT, 1, 3; PROMISSORY NOTE.

NEW TRIAL.

If the verdict in an action the declaration in which contains several counts is a general one, and the defendant was entitled to have some of his requests for instructions granted, which were refused, a new trial will be ordered. *Fairman* v. *Boston & Albany Railroad*, 170.

See EXCEPTIONS, 5.

NEXT OF KIN.

See DEVISE AND LEGACY, 8.

NOTICE.

See BETTERMENT, 3; CARRIER, 3; CONTRACT, 5, 8, 9; ESTATES OF PERSONS DECEASED, 1; INJUNCTION, 1; PRINCIPAL AND AGENT; RECEIVER, 2; WAIVER, 2, 3.

NUISANCE.

See EMINENT DOMAIN, 4.

OFFICER.

See CITY; CONTRACT, 3; EVIDENCE, 4; QUO WARRANTO, 1.

ORDINANCE.

See EVIDENCE, 2; HIGHWAY,

PARENT AND CHILD.

The father of a child, who is its natural guardian, has a right, in case the child dies, to the possession of its body for burial, and may maintain an action for an unauthorized autopsy performed on the dead body of the child. *Burney* v. *Children's Hospital*, 57.

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PARK.

See CONTRACT, 4.

PARTIES.

See QUO WARRANTO, 2; RECEIVER, 1; TRIAL, 2.

PARTITION.

See POWER, 3.

PARTNERSHIP.

The giving by B., without the knowledge or authority of C., who does not ratify the act, of a promissory note in the name of a firm composed of A., B., and C., in payment of a note given by A. individually for money borrowed to enable him to pay in his share of the capital of the partnership, is not within the general authority of a partner to bind his firm, and if it was not done according to the usual course of the firm's business, and no authority to use the firm's name for such a purpose was contained in the articles of copartnership, the note cannot be proved against the estate of the firm in insolvency, although the firm note was given for the purpose of preventing legal proceedings being taken to reach A.'s interest in the property of the firm. *Durrell* v. *Staples*, 49.

See EQUITY, 1, 5, 7, 8.

PAYMENT.

See ACTION, 1, 2; CONVERSION; ESTATES OF PERSONS DECEASED, 4; INSOLVENT DEBTOR; INSURANCE, 1; PROMISSORY NOTE; TRIAL, 5; WAIVER, 2, 3.

PENALTY.

See DOG, 1.

PLEADING.

See DECLARATION; FALSE REPRESENTATIONS; LIBEL, 1, 3.

PLEDGE.

See ASSIGNMENT, 1; CONTRIBUTION; CONVERSION; EQUITY, 8; PROMISSORY NOTE.

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POOR DEBTOR.

1. It is no defence to an action upon a poor debtor's recognizance that the creditor made no attempt to find property of the debtor upon which the execution on which he was arrested could be levied before so arresting him. *Watts* v. *Stevenson*, 61.
2. The arrest of a debtor upon an execution, within thirty days from the date of the judgment on which the execution issued, is not a waiver of the right to sue, after the arrest, on a bond given to dissolve the attachment made in the action in which the judgment was obtained, but the creditor may maintain at the same time actions upon the bond, and upon a recognizance given by the debtor to relieve himself from the arrest. *Ibid.*

POWER.

1. A mortgagee of land, when there has been no default or breach of the conditions of the mortgage, cannot sell the land under the usual power of sale contained in a mortgage, so as to pass a good title even to a *bona fide* purchaser for value, or to any subsequent purchaser from him. *Rogers* v. *Barnes*, 179.
2. An action may be maintained by a mortgagor of land against the mortgagee for the wrongful execution of a power of sale in the mortgage, whether a subsequent purchaser from the purchaser at the sale took a good absolute title or not; and the plaintiff, if he so elects, may recover full damages of the defendant, whether he can or cannot redeem the premises from such purchaser. ALLEN, HOLMES, & KNOWLTON, JJ., dissenting. *Ibid.*
3. E., who was tenant in common of land with his wife R., and who died in 1880, gave her by will his entire estate "to hold to her during her lifetime, with full power to use and dispose of the same as she shall deem right and proper. And after the decease of the said R., I give, devise, and bequeath all the remainder of my said estate to my son, W., to hold to him, his heirs and assigns forever." W., who died in 1893 intestate, left a widow, M., and no issue living, and no real estate except that in controversy, the value of which did not exceed $5,000. R., who died in 1896, gave by will, after a small legacy, the residue of her estate "to my brother H. . . . and his heirs forever." M., having brought a petition for partition against H., who died while the proceedings were pending, T. suggested H.'s death, claiming that H. had conveyed to him the premises, and he was admitted a party defendant. It appeared that T. acted for another, that he had notice of the true state of the title, and that H. and the person for whom T. acted knew all the facts. *Held*, that the power of disposal in R. did not extend to a disposal by will, that a certain deed given by her in 1890 was not an exercise of the power as it was never delivered, that the grantee of H. was his agent and not a *bona fide* purchaser without notice, and that the judgment for partition by the Superior Court should be affirmed. *Ford* v. *Ticknor*, 276.

See DECLARATION; EQUITY, 8; TRUST AND TRUSTEE, 1, 2; VENUE.

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POWER OF ATTORNEY.

See PRINCIPAL AND AGENT.

PRACTICE.

See ACTION, 2; AGREED FACTS; APPEAL; AUDITOR; EQUITY, 5-9; EXCEPTIONS; FOREIGN JUDGMENT; INSTRUCTIONS; JURY; NEW TRIAL; POOR DEBTOR; QUO WARRANTO, 2, 3; RECEIVER; RECORD; REVIEW; SUPERIOR COURT; SUPREME JUDICIAL COURT; TRIAL; TRUSTEE PROCESS; VARIANCE; VENUE; VERDICT.

PREFERENCE.

See INSOLVENT DEBTOR.

PRINCIPAL AND AGENT.

1. At the trial of an action upon a draft purporting to be accepted by the drawee through a person who was his agent, the extent of the latter's authority was in controversy. The judge refused certain requests for rulings, and instructed the jury, in substance, that the drawee would not be liable simply because, if he had been sharper or more careful, he would have discovered his agent's course of dealing, but he must actually have known of acts of the agent conveying to the public the impression that his authority was greater than it was in fact, before the drawee's silence could be held to sanction the agent's course, and to give him ostensible authority to continue it. *Held*, that no error appeared. *Merrimac Morris Bank* v. *Gorham*, 519.
2. It is only within the scope of an agent's employment that his principal must look out for the agent's misconduct when there is nothing but the employment to give warning. *Ibid.*
3. If a draft is accepted by the drawee through an agent "p. p. a.," which may be found to mean "per power attorney," these letters are notice to a bank discounting the draft that the agent depended for his authority to sign upon a written document, and the bank takes its chances if it does not call for the production of the power; and, in an action on the draft, the power of attorney is admissible in evidence. *Ibid.*

See EVIDENCE, 17; EXCEPTIONS, 12.

PRINCIPAL AND SURETY.

See BOND, 4, 6, 7; RECORD.

PRIVILEGED COMMUNICATIONS.

See LIBEL, 2.

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PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROMISSORY NOTE.

Where there is nothing to show that it was known to a bank that the note of A. payable to the order of B. was an accommodation note, or that the bank took the note otherwise than in good faith and for value, in an action on the note by the bank against A. the question whether another note, given after the maturity of the first note, by B., which included the amount of the first note and of another note given by C., which was also overdue and which had been discounted by the bank for B., operated as a payment of the first note, is one of fact, depending upon the intention of the parties and the other circumstances surrounding the transaction; and the finding of the judge, by whom the case was tried without a jury, that it did not operate as payment, is conclusive. Delay by the bank to enforce payment, if not for six years, will not release A.; and the case is not altered because the delay was at the request of the indorser B., and accompanied by an agreement between him and the bank that C.'s overdue note should be regarded as security for the new note given by B. *Agawam National Bank* v. *Downing*, 297.

See CONTRIBUTION; EQUITY, 8; PARTNERSHIP.

PURCHASER IN GOOD FAITH.

See DECLARATION; POWER.

QUO WARRANTO.

1. Membership in a political committee belonging to a political party is not a public office, and an information in the nature of a *quo warranto* will not lie to try the title. *Attorney General* v. *Drohan*, 534.
2. Relators, whose rights could not be determined by an information in the nature of a *quo warranto*, having filed a motion to amend the information by striking out the name of the Attorney General and inserting their own names, so that they might be the sole parties plaintiff, the court, assuming that such an amendment would be allowed, with other amendments, if any, that might be necessary, proceeded to consider the questions which thus would be presented, speaking of the relators thenceforward as the plaintiffs. *Ibid.*
3. A corporation was chartered under Pub. Sts. c. 115, for the purposes of "promoting pleasant relations among its members; discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business; and establishing and maintaining a place for social meetings." It consisted of about twenty firms

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engaged in selling plumbers' supplies, and, claiming to act under its franchises, took proceedings against persons whom its members might represent to it as owing them overdue bills for plumbers' supplies, sending notices to such persons, and also notices to its members other than the creditor, as a method of compelling the alleged debtors to pay what its members demanded, by means of threatening to expose to certain dealers their alleged delinquencies, by actually informing such dealers that these persons owed overdue accounts, and by preventing them from obtaining credit from a number of dealers in goods needed in their business; and also required such persons, where the correctness of the claim was disputed, to submit the controversy to arbitration. *Held*, that a plumber against whom the corporation had so proceeded was entitled to file an information in the nature of a *quo warranto* against the corporation. ALLEN, KNOWLTON, & LATHROP, JJ., dissenting. *Hartnett* v. *Plumbers' Supply Association of New England*, 229.

See EVIDENCE, 4.

RAILROAD.

1. A railroad corporation has the right to establish such signals, in addition to those required by law at crossings, as are reasonable and proper for the operation of its railroad, and if an injury to a person at work with a horse and cart upon an adjacent highway happens in consequence of the giving of such signals by the servants of the corporation under circumstances which justified them in so doing, the injured person has no right of recovery against the corporation. *Flynn* v. *Boston & Albany Railroad*, 305.
2. A signal established by a railroad corporation may be reasonable and proper in itself, and yet the circumstances may be such that it would be negligence on the part of the servants of the corporation to use it, and due care might require that the object to be accomplished by the giving of it should be reached in some other manner. *Ibid.*
3. If the signals required by statute were not sounded, the jury, in an action against a railroad corporation for causing the death of a traveller in the evening at a grade crossing, may infer that the absence of them occasioned the accident, where he was seen driving at a trot a mile and a half from the crossing, and then was awake, and the train was an express one. *Lamoureux* v. *New York, New Haven, & Hartford Railroad*, 383.

See ACTION, 5; CARRIER; DAMAGES, 3; EVIDENCE, 21, 25; EXCEPTIONS, 19; GRADE CROSSING; INSURANCE, 7; MASTER AND SERVANT, 4; NEGLIGENCE, 3–8; RECEIVER, 1.

RATIFICATION.

See BOND, 5.

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REAL ESTATE.

See ACTION, 8; BETTERMENT; BOUNDARY; BROKER; DEVISE AND LEGACY, 4, 6, 9, 10; EASEMENT, 2; EMINENT DOMAIN; EVIDENCE, 19, 20, 23–25; MECHANIC'S LIEN; MORTGAGE; POWER; VENUE.

RECEIVER.

1. The receivers of a railroad corporation, who are authorized to operate and manage the railroad, are liable to an action under Pub. Sts. c. 112, § 214, providing that "Every railroad corporation . . . shall be responsible in damages to a person . . . whose buildings or other property may be injured by fire communicated by its locomotive engines." *Wall* v. *Platt*, 398.
2. Where the question of the right of a receiver of a foreign corporation to sue was not raised upon the demurrer or presented in argument, the court said that from the statements that the notes and account on which the claim was founded were "among the assets which came into the hands and ownership of the plaintiff as such receiver," and that he prevailed in all stages of a suit on the same claim against the defendant's intestate in the United States courts, the defendant's intestate having had personal service, having appeared by counsel, and having sworn to the answer personally, and the plaintiff having had no notice of the death of the defendant's intestate until after the final decree was entered, it might fairly be inferred that as receiver he became assignee of the assets. *Ewing* v. *King*, 97.

See EQUITY, 5, 7, 8; ESTATES OF PERSONS DECEASED, 2; INSURANCE, 3.

RECOGNIZANCE.

See POOR DEBTOR.

RECORD.

In an action on a bond the statement of the ruling by a judge of the Superior Court that "the question as to the liability of the sureties on the bond, by reason of the special matter set up in their answers, is not open to the sureties after the verdict," although certified by the clerk as by the court, stands no differently from a memorandum to like effect under the hand of the judge, and is no part of the record; and the remedy of the sureties is by bill of exceptions, and not by appeal. *New York Life Ins. Co.* v. *Macomber*, 580.

See EVIDENCE, 1, 2; REVIEW, 2; WILL, 2.

REDEMPTION.

1. The life tenant of a portion of an estate covered by a mortgage may redeem his interest by paying his proportional part of the mortgage debt, if the mortgagee assents thereto. *Kerse* v. *Miller*, 44.

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2. If the life tenant of a portion of an estate covered by a mortgage redeems the entire estate, he is not subrogated to the rights of the mortgagee, but is entitled to possession of the whole estate until the amount paid by him above his proportional share has been repaid to him. *Kerse* v. *Miller*, 44.
3. A decree upon a bill in equity to redeem land from a mortgage, which directs the delivery to the plaintiff of the mortgage and note, and requires the defendant to discharge the mortgage, is erroneous. *Ibid.*
4. Upon an appeal from a decree in a suit in equity to redeem land from a mortgage, where the evidence is not reported, if the decree states that the taxes for certain years paid by the defendant on a day named were not allowed in the accounting, and the defendant's answer alleges that he took possession of the property under a deed to him of the equity of redemption, and not under the mortgage, enough does not appear to show that the decree is wrong in not allowing the taxes in the account. *Ibid.*

REGISTRY OF DEEDS.

See EVIDENCE, 25.

RELEASE.

See ASSIGNMENT, 2; BETTERMENT, 1, 2, BOND, 6; TOWN.

REMAINDER.

See DEVISE AND LEGACY, 4, 6, 7.

REPORT.

See AUDITOR; GRADE CROSSING, 3, 5; SUPERIOR COURT; TOWN.

REPUTATION.

See EVIDENCE, 9.

RESCISSION.

See CONTRACT, 7–9; WAIVER.

RES GESTÆ.

See CONVERSION.

REVIEW.

1. A bill of review may be brought in the Superior Court to review a final decree in equity made by that court. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 157.

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2. A bill of review, brought to review a final decree in equity for error of law apparent on the face of the record, properly should set out in full the pleadings, proceedings, and final decree, but not the evidence. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 157.

See SUPERIOR COURT, 2.

REVOCATION.

See TRUST AND TRUSTEE, 1, 3.

RULES OF COURT.

See AMENDMENTS TO RULES, 603.

SALE.

See CONTRACT, 2; EQUITY, 8; FALSE REPRESENTATIONS; INSURANCE, 2.

SAVINGS BANK.

See BOND, 1–5; DEVISE AND LEGACY, 8.

SEAL.

See EQUITY, 3, 4; EVIDENCE, 24.

SEAMAN.

See MASTER AND SERVANT, 6, 7.

SET-OFF.

See LIMITATIONS, STATUTE OF, 2.

SEWER.

See EASEMENT, 1; EMINENT DOMAIN, 1–4; EVIDENCE, 19, 20.

SHIPS AND SHIPPING.

See MASTER AND SERVANT, 6, 7.

SLANDER.

See LIBEL.

SPECIFIC PERFORMANCE.

See WAIVER, 3, 4.

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STATUTE.

See BETTERMENT, 1, 2; BOND, 3; CITY, 1; CONSTITUTIONAL LAW; DAMAGES, 3; DIVORCE; DOG, 1, 2; EASEMENT, 1; ELECTIONS; EMINENT DOMAIN, 1–4, 6–10; EMPLOYERS' LIABILITY ACT, 1, 3–8; EQUITY, 1; ESTATES OF PERSONS DECEASED, 1–3; EVIDENCE, 4, 18, 19; EXCEPTIONS, 10; FRAUDS, STATUTE OF; GRADE CROSSING, 1–5; HIGHWAY, 1, 2; INSOLVENT DEBTOR; INSURANCE, 1, 3; MECHANIC'S LIEN, 4, 6; MOTION TO QUASH; QUO WARRANTO, 3; RECEIVER, 1; WILL, 1.

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STREET RAILWAY.

See EXCEPTIONS, 3; HIGHWAY, 4; MASTER AND SERVANT, 10; NEGLIGENCE, 2.

SUBROGATION.

See BETTERMENT, 2; REDEMPTION, 2.

SUPERIOR COURT.

1. A justice of the Superior Court has the right to report to the full court an equity case upon the pleadings and facts found by him, without deciding the case. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 157.
2. A final decree in equity of the Superior Court, entered in accordance with a rescript of this court, after a hearing of the case on report, cannot be reversed by a bill of review brought in the Superior Court, on the ground that this court has erred in law; but the remedy is by a petition to this court for a rehearing, which is addressed to its discretion. *Ibid.*

See AGREED FACTS; APPEAL; AUDITOR; EQUITY, 5–7; REVIEW, 1; VERDICT.

SUPREME JUDICIAL COURT.

1. Although it is not the practice of the full court to rehear parties upon questions which have been once argued and decided, or to hear them upon questions of law which have been waived or abandoned at a former hearing, yet it, in its discretion, may do so. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 157.
2. Common law rules amended, see p. 603.

See AGREED FACTS; AUDITOR; EQUITY, 2; MASTER IN CHANCERY; SUPERIOR COURT; TRIAL, 3.

SURETY.

See BOND, 4, 6, 7; RECORD.

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SURPLUSAGE.

See LIBEL, 3.

SURVIVORSHIP.

See DEVISE AND LEGACY, 5.

TAKING.

See EMINENT DOMAIN.

TAX.

See REDEMPTION, 4.

TENDER.

See ACTION, 2.

TITLE.

See INSURANCE, 2; POWER, 1, 2; QUO WARRANTO, 1; WRIT OF ENTRY.

TORTS.

See ACTION, 4, 5; CONVERSION; DAMAGES, 2; EMPLOYERS' LIABILITY ACT; EVIDENCE, 8–18, 21; EXCEPTIONS, 3, 19; GRADE CROSSING; HIGHWAY; INFANT; LIBEL; MALICIOUS PROSECUTION; MASTER AND SERVANT.

TOWN.

In this case, which was a bill in equity to restrain the defendant from foreclosing a mortgage held by him as trustee for the inhabitants of a town, on the ground that they had voted to release the plaintiff from all liability thereon, the report was discharged, the court saying that it should be first found whether the vote to release was by way of gratuity, or because the claim was regarded as unfounded. *Wells* v. *Putnam*, 226.

See EXCEPTIONS, 3; HIGHWAY, 3–5; NEGLIGENCE, 1.

TRAVELLER.

See HIGHWAY, 2–5; NEGLIGENCE, 1–5; RAILROAD

TRESPASS.

See BOUNDARY, 2; EASEMENT, 2.

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TRIAL.

1. A finding for the plaintiff in an action tried without a jury will stand, if supported by any fair view of the evidence, and not shown to have been affected by any error in law. *Washburn* v. *Bradley*, 86.
2. In an action by a broker against A., another broker, and B., the former owner of land, to recover a commission on the sale of the land, it was held that the evidence disclosed no special contract which bound A., and as the jury had been allowed to consider a payment made by A. for the purpose of bringing about the sale as a payment by a joint party to B.'s contract with the plaintiff, and thus as not having brought about the sale as against the plaintiff, it was *held* that there was a mistrial with regard to B. *Whitcomb* v. *Dickinson*, 16.
3. At the trial together of three actions against a railroad corporation for causing the death of the plaintiff's intestates, one of whom died instantly, one in two weeks, and one, a child, in two and a half months after the accident, the judge, in the course of his charge, stated that possibly there was evidence of conscious suffering of one of the intestates, but, at the defendant's request, instructed the jury, at the close of the charge, that the plaintiff could not recover damages for conscious suffering. The verdict in the second case was $1200 larger, and that in the third case $600 larger, than the one in the first case. *Held*, that there was no error in the instructions; and that this court could not draw inferences that the jury were misled from the differing size of the verdicts. *Lamoureux* v. *New York, New Haven, & Hartford Railroad*, 338.

See EXCEPTIONS; JURY; NEW TRIAL; VARIANCE.

TROVER.

See CONVERSION.

TRUST AND TRUSTEE.

1. A voluntary trust completely established, with no power of revocation reserved, cannot be revoked or set aside at the will of the person by whom and with whose property it was set on foot. *Lovett* v. *Farnham*, 1.
2. Where an absolute discretion is not clearly given, to be exercised at the will of the person empowered to make a sale or appropriation of principal, an exercise of the power, to be valid, must be founded upon a reasonable judgment dealing with existing facts and reasonable anticipations of the future, and having due regard for the purposes for which the power was given, and also for the rights of those whose interests are injuriously affected by its exercise. *Ibid.*
3. A woman placed funds in the hands of A., in trust to pay over the income for her support and maintenance "as she shall require it, and such portion of the principal as she in her judgment may deem necessary for her comfort and support, and at her death, after the payment of her just

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debts and funeral expenses, to divide" what remained "equally between her two children, . . . share and share alike, if they be then living, and if either or both of them be dead then to their children by right of representation." After having paid over the income for five years, A. received from the settler a letter stating, "I hereby request of you at this time" a certain sum, "or whatever may be the value of the principal, and which I deem necessary at this time for my comfort and support." A few days thereafter a new trust instrument was signed by him and the settler in duplicate, and he was informed that the letter and this new trust agreement constituted a revocation of the first trust, and that the property held by him thereunder had been revested in him under the second trust. *Held*, on the death of the settler, that the first trust was not revoked, and the second trust was not substituted therefor. *Lovett* v. *Farnham*, 1.

See ASSIGNMENT, 3; DEVISE AND LEGACY, 2, 4–10; TOWN.

TRUSTEE PROCESS.

A valid attachment by trustee process of funds in the hands of the trustee can only be made as against third persons by the service of the writ on the trustee by a duly authorized officer. The acceptance of service indorsed by the trustee on the writ is not sufficient. *Creed* v. *Gilman*, 562.

VARIANCE.

It is no variance to prove, at the trial of an indictment for obtaining money by false pretences in W., that the money was actually received by the defendant in B. *Commonwealth* v. *Sessions*, 329.

See LIBEL, 3.

VENDOR AND PURCHASER.

See CONTRACT, 2; INSURANCE, 2.

VENUE.

An action for the wrongful execution of a power of sale in a mortgage of land is transitory. *Rogers* v. *Barnes*, 179.

VERDICT.

Whether the 45th Rule of the Superior Court, allowing a general verdict to be amended and entered upon one of several counts, is applicable to a case where the declaration contains several counts which are good and are not for the same cause of action, *quære*. *Coffing* v. *Dodge*, 459.

See BOND, 6; LIMITATIONS, STATUTE OF, 2; NEW TRIAL; RECORD; TRIAL, 3.

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WAIVER.

1. A waiver of one breach of a contract cannot be considered a waiver of a subsequent breach. *Wilkinson* v. *Blount Manuf. Co.* 374.
2. *It seems*, that if one party to a contract, immediately after he receives notice from the other party of a rescission of the contract for breach of a covenant to pay for goods within a time limited therein, pays what is due, and the former receives the money, this will be a waiver of the breach, unless he gives notice that he does not intend to waive his right to terminate the contract. *Ibid.*
3. At the hearing of a bill in equity for specific performance of a contract, by which the plaintiff covenanted to pay for goods furnished by the defendant within sixty days from their delivery, and which provided that "upon the breach of any of the covenants herein contained by either party, the other party may terminate and rescind this contract," it was found that the plaintiff, in a letter in reply to a notice by the defendant that he rescinded the contract for breach of the covenant above named, "inclosed a bank check for the amount then due and payable, according to the books of both parties," for all goods not paid for which had been delivered to him sixty days previously; but it was not found that the defendant received the check, or what became of it, nor did it appear whether, if he received it, he took it conditionally or unconditionally. *Held*, that there was not enough shown to amount to a waiver. *Ibid.*
4. One party to a contract, by committing a breach of it, does not lose the right to rescind the contract for a previous breach committed by the other party while both were acting under it as an existing contract, and the latter, who does not seek to rescind it, cannot maintain a bill in equity for specific performance of the contract. BARKER, J., dissenting. *Ibid.*

See INSURANCE, 1; POOR DEBTOR, 2.

WATER AND WATERCOURSE.

See ACTION, 4; EMINENT DOMAIN, 7, 8.

WAY.

At the trial of an action for obstructing an alleged right of way granted by an ambiguous deed, the defendant is not entitled to a ruling that the practical location and use of the way by the plaintiff operated as an assignment of the right, and must be deemed to be that which was intended by the deed. *Quigley* v. *Baker*, 303.

See BETTERMENT; EVIDENCE, 23; FRAUDS, STATUTE OF; HIGHWAY.

WIDOW.

See DEVISE AND LEGACY, 9; ESTATES OF PERSONS DECEASED, 4.

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WILL.

1. A person who was ill in bed, and unable to leave it signed his will in the presence of the subscribing witnesses, who thereupon withdrew to another room in the house, no part of which was visible from any part of the room where the testator remained, and there subscribed as witnesses. They then returned to the presence of the testator, and one of them, with the assent of the others, said that they had signed his will, and showed him the signatures, and he assented thereto. *Held*, that the will was not properly attested within the meaning of the Pub. Sts. c. 127, § 1. *Medell* v. *Dunbar*, 74.

2. There is no provision of statute which requires the consent of a husband to his wife's will to be written thereon, and such consent may be shown by an ante-nuptial agreement, executed by him, although it is inartificially drawn and its meaning is not free from doubt; and it is immaterial that the agreement contained no schedule of property, and was not recorded. *Cook* v. *Adams*, 186.

See DEVISE AND LEGACY.

WITNESS.

See EVIDENCE, 15, 18, 20; JURY; WILL, 1.

WORDS.

"About." See *Iverson* v. *Swan*, 582, 583.

"All such estate, property, funds, and moneys as shall from time to time become part of the residue of my estate under the provisions of this my will." See *Rotch* v. *Loring*, 190, 195, 198, 199.

"All the property coming under my said will from my estate to my [two] sons shall be held in trust." See *Shaw* v. *Eckley*, 119, 123.

"Alteration." See *Bigelow* v. *Worcester*, 390, 393; *Westborough, petitioner*, 495, 497.

"Any default in the performance or observance." See *Rogers* v. *Barnes*, 179, 183.

"As though I died intestate." See *Heard* v. *Read*, 216, 221, 224.

"As under all the circumstances justice and equity require." See *Merrill* v. *Old Colony Mutual Ins. Co.* 408, 409.

"At and after the decease of my said daughter, I give," etc. See *Heard* v. *Read*, 216, 224.

"At this date constituting the firm of." See *Lawrence* v. *Hull*, 250, 252.

"By reason or in consequence of snow or ice thereon, if . . . otherwise reasonably safe and convenient for travellers." See *Newton* v. *Worcester*, 516, 518.

"By right of representation." See *Siders* v. *Siders*, 523, 524, 525.

"Charge or control." See *Fairman* v. *Boston & Albany Railroad*, 170, 176, 178.

"Consent." See *Perry* v. *Potashinski*, 351.

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"Contained in brick block situated No. —." See *Westfield Cigar Co.* v. *Insurance Co. of North America*, 382, 383.
"Culpable neglect." See *Ewing* v. *King*, 97, 101.
"Deed, grant, bargain, sale, gift." See *Cook* v. *Adams*, 186, 189.
"Delivery." See *People's National Bank* v. *Freeman's National Bank*, 129, 133.
"Desire." See *Cook* v. *Adams*, 186, 189.
"Devisee." See *Jones* v. *Treadwell*, 430, 433.
"Discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the . . . business." See *Hartnett* v. *Plumbers' Supply Association*, 229, 234.
"Due process of law." See *Dowdell, petitioner*, 387, 389.
"Easements, rights in land, and other property." See *Burnett* v. *Commonwealth*, 417, 427.
"Establishing and maintaining a place of social meetings." See *Hartnett* v. *Plumbers' Supply Association*, 229, 234.
"Exercise of due diligence." See *Tilton* v. *Boston & Albany Railroad*, 253, 256.
"Finding." See *New York Life Ins. Co.* v. *Macomber*, 580, 581.
"Following (The) legacies are to be paid only after full provision of income for my wife and daughter during their respective lives, and of the principal fund for issue of my daughter, as appointed in the third and fourth articles." See *Weston* v. *Massachusetts General Hospital*, 76, 81.
"Heir." See *Jones* v. *Treadwell*, 430, 432.
"Heirs at law." See *Rotch* v. *Loring*, 190, 198, 199; *Welch* v. *Brimmer*, 204, 213; *Heard* v. *Read*, 216, 221, 224.
"Her share of the moiety of my estate." See *Welch* v. *Brimmer*, 204, 209.
"If my said daughter shall leave no issue surviving her, the trust premises shall, at her decease, be divided," etc. See *Heard* v. *Read*, 216, 224.
"In addition to the $500 aforesaid bequeathed to her." See *Hammond* v. *Hammond*, 82, 85.
"In case my said son shall die having no issue him surviving." See *Welch* v. *Brimmer*, 204, 210, 211.
"In case of the decease of my said son without issue, or such issue shall not attain majority." See *Welch* v. *Brimmer*, 204, 210, 211.
"In equal shares by right of representation." See *Siders* v. *Siders*, 523, 524, 525.
"In the event that she should make no disposition of it during her lifetime." See *Ford* v. *Ticknor*, 276, 280.
"Issue (The) of a deceased child, other than the issue, if any, of my said son, taking their parent's share by right of representation." See *Shaw* v. *Eckley*, 119, 122.
"I think all of these things are stated in a little different way, perhaps better, than what I stated." See *Crowninshield* v. *Foster*, 237, 239.
"Knew or had means of knowing." See *New York Life Ins. Co.* v. *Macomber*, 580, 582.
"Knowingly." See *Mount Morris Bank* v. *Gorham*, 519, 521.
"Land not held by a clear title." See *Whitman* v. *Nantucket*, 147, 149.
"Market value." See *Wall* v. *Platt*, 398, 405, 406.

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"Nearest of kin." See *Keniston* v. *Mayhew*, 166, 169.
"Not upon fixed payments but upon the collection from time to time of an assessment." See *French* v. *Hartford Life & Annuity Ins. Co.* 510, 512.
"Open and mutual account current." See *Kingsley* v. *Delano*, 285, 287.
"Or at the decease of his issue during minority." See *Welch* v. *Brimmer*, 204, 210.
"Other personal property." See *Wall* v. *Platt*, 398, 407.
"Other (The) part shall be divided among my heirs at law, as though I died intestate." See *Heard* v. *Read*, 216, 222, 224.
"P. p. a." See *Mount Morris Bank* v. *Gorham*, 519, 522.
"Preference." See *Hall* v. *Haskell*, 291, 294.
"Professes entire ignorance." See *Haynes* v. *Clinton Printing Co.* 512, 513.
"Promoting pleasant relations among its members." See *Hartnett* v. *Plumbers' Supply Association*, 229, 233.
"Public office." See *Attorney General* v. *Drohan*, 534, 535.
"Railroad corporation." See *Wall* v. *Platt*, 398, 401, 402.
"Reasonably safe and convenient for travellers." See *Harris* v. *Great Barrington*, 271, 274.
"Remove for such cause as he may deem sufficient." See *Attorney General* v. *Donahue*, 18, 22.
"Rights." See *Burnett* v. *Commonwealth*, 417, 427.
"Scoop." See *Call* v. *Hayes*, 586, 592.
"Security." See *Haskell* v. *Hill*, 124, 128.
"Shall." See *Welch* v. *Brimmer*, 204, 213.
"Shall stand as the true result." See *Attorney General* v. *Drohan*, 534, 535.
"Showed the foreclosure was apparently proper in form." See *Rogers* v. *Barnes*, 179, 183.
"Specific repairs." See *Bigelow* v. *Worcester*, 390, 392, 393.
"Such portion of the principal as she in her judgment may deem necessary for her comfort and support." See *Lovett* v. *Farnham*, 1, 2, 5, 6.
"Survive." See *Shaw* v. *Eckley*, 119, 123.
"Then living." See *Rotch* v. *Loring*, 190, 196; *Welch* v. *Brimmer*, 204, 213.
"To be true." See *Commonwealth* v. *Sessions*, 329, 336.
"Trust premises." See *Heard* v. *Read*, 216, 221.
"Voluntary exposure to unnecessary danger." See *Willard* v. *Masonic Equitable Accident Association*, 288, 290.
"Ways, works, or machinery." See *Beique* v. *Hosmer*, 541, 543; *Donahue* v. *Washburn & Moen Manuf. Co.* 574.
"Will." See *Cook* v. *Adams*, 186, 189.
"Will or testamentary disposition." See *Rotch* v. *Loring*, 190, 197.
"With full power to use and dispose of the same as she shall deem right and proper." See *Ford* v. *Ticknor*, 276, 280.
"With one horse power only." See *Cummings* v. *Perry*, 150, 153.
"Without conscious suffering." See *Green* v. *Smith*, 485, 492.

WRIT.

See Quo Warranto; Trustee Process.

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WRIT OF ENTRY.

Where a wife's possibly fraudulent title obtained from her husband has been devested by a sale on execution, in an action against her husband, to one who conveys the land to the wife, the title which she thus acquires, and which she conveys by mortgage and again obtains by foreclosure, is not a fraudulent but a valid title, and a writ of entry by a creditor of her husband, who has attached all the husband's interest in the land after the foreclosure and purchased the same at the sale on execution, will not lie against the wife. *Dimock* v. *Ridgeway*, 526.

WRITTEN INSTRUMENTS.

See ASSIGNMENT; BOND; BOUNDARY; CONTRACT, 1, 4, 5, 9; EASEMENT; EQUITY, 1, 3, 4; FRAUDS, STATUTE OF; LANDLORD AND TENANT; MORTGAGE.

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